IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI I BENCH, NEW DELHI

[Coram: Pramod Kumar AM, and C. M. Garg JM]

I.T.A. No.: 5025/Del/10
Assessment year: 2006-07

Toll Global Forwarding India Pvt Ltd ***……………….Appellant***
(formerly known as Baltrans Logistics India Pvt Ltd)
G-A, Ground floor, Golf View Corporate Tower –A
Sector 42, Golf Course Road, Gurgaon 122 002
[PAN : AACCD1028Q]

Vs.

Deputy Commissioner of Income Tax
Circle 2 (1), New Delhi ***……………..…Respondent***

Appearances by:

Rohit Tiwari, *for the appellant*
Y K Verma, *for the respondent*

O R D E R

Per Pramod Kumar, AM:

1. By way of this appeal the assessee appellant has called into question correctness of the assessment order dated 21st August 2006 passed by the Deputy Commissioner of Income Tax, Circle-2(1), New Delhi *[hereinafter referred to as 'the Assessing Officer']* in the matter of assessment under section 143(3) read with section 144C of the Income Tax Act, 1961 *[hereinafter referred to as 'the Act']* for the assessment year 2006-07.

2. Although this appeal raises as many as 18 grounds of appeal, one of the fundamental issues which require our adjudication at the threshold is whether

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or not the authorities below were justified in rejecting the CUP (Comparable Un-controlled Price) method of determining the arm's length Price in respect of transactions entered into by the assessee with its associated enterprises. This issue is raised by way of the following interconnected grounds of appeal:

> **Ground 2: The learned DRP and the learned AO. following the directions of the DRP, erred on facts and in law, in upholding the learned TPO's stance of rejecting the Comparable Uncontrolled Price method chosen by the appellant as the most appropriate method to benchmark its international transactions with the AEs, in TP documentation report for the year (maintained under section 92D of the Act read with Rule 10D of the Income Tax Rules, 1962) to substantiate that its international transactions of provision/ receipt of freight forwarding services to/from AEs during the year were at arm's length, and selecting the Transactional Net Margin Method instead.**
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> **Ground 3: The learned DRP and the learned AO, following the directions of the DRP, erred on facts and in law, in upholding the learned TPO's stance of disregarding the benchmarking approach adopted by the appellant in its TP documentation report for the year to substantiate that its international transactions of provision/receipt of freight forwarding services to/from AEs during the year were at arm's length, without any cogent evidence, facts or basis whatsoever.**
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> **Ground 4: The learned DRP and the learned AO, following the directions of the DRP, erred on facts and in law, in upholding the learned TPO's stance of not appreciating that the pricing basis followed by the appellant in respect of its international transactions of provision/receipt of freight forwarding services to/from AEs is in**

line with well accepted/prevalent business models followed in the global/Indian freight forwarding industry by independent freight forwarding companies.

Ground 5: The learned DRP and the learned AO, following the directions of the DRP, erred on facts and in law, in upholding the learned TPO's stance of not appreciating/ taking cognizance of the evidentiary documents submitted by the appellant during the TP audit proceedings to establish that the pricing basis followed by it in respect of its international transactions of provision/receipt of freight forwarding services to/from AEs is the same/similar to the pricing basis followed by it while transacting with third parties for similar services.

3. To adjudicate on this issue only a few material facts need to be taken note of. The assessee company is a joint venture BALtrans International (BVI) Limited- a company listed in Hongkong Stock Exchange, holding 74% equity, and Kapil Dev Dutta, holding balance 26% equity. As stated in the transfer pricing study report, it is engaged in the business of freight transportation, time defined air and ocean transport and freight forwarding. The assessee is primarily engaged in the business of freight forwarding through air and ocean transportation, but, unlike a business model in which the assessee owns or manages such means of transportation on his own and which includes rendition of related services outside India as well, the assessee is using services of other enterprises for these purposes. In the course of conducting this business, the assessee picks up or receives freight shipments from its customers, consolidates these shipments of various customers for common destinations, arranges for transportation of the consolidated freight to these destinations, and, at destination, distributes the shipments and effects delivery to the consignees. The assessee also facilitates the custom clearances at the international points of entry. These services are offered either directly by the appellant to its

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customers, or, as a part of deliverables sold to overseas customers by the assessee's AEs as also unrelated third party agents abroad. In respect of the cases in which services are rendered to the overseas customers, the assessee receives these shipments from such AEs or independent third party associates, obtains customs clearance at the port of entry, and organizes delivery of these consignments to the consignees in India. In essence, thus, the assessee, along with its associated enterprise, offers multi modal transportation services to business to business shippers through global freight forwarding services. The company is having two types of international transactions – (a) arranging import of cargo from other countries to India by air and sea transportation and delivering the same to consignees in India; (b) arranging export of cargo from India to other countries by air and sea transportation wherein consignments are picked up in India by assessee and are sent to destination as per instruction of shippers/consigners for the purpose of delivering to consignees through its associated enterprises abroad. While the assessee controls pricing to the end customers in domestic market, pricing for end customers in connection with consignment picked up abroad is essentially determined by the associate abroad. However, in line with, what are stated to be, the global practices followed by the similar companies in freight forwarding industry, the profits earned, after deducting transportation costs, by the assessee and its AEs or independent third party business associates, in respect of import and export of cargo are shared in a 50:50 ratio. In the transfer pricing report submitted by the assessee, the assessee has adopted the Comparable Uncontrolled Price (CUP) method for determining the arm's length price. However, the A.O. rejected the said method and proceeded to adopt Transactional Net Margin (TNMM) method. The stand of the TPO was that the "CUP method chosen in the transfer pricing report for both imports and exports has not been demonstrated". It was also stated that "even in the International transactions ought to be analysed on CUP method, the assessee is required to furnish the documents/vouchers related to third party for export and import transactions related to controlled and uncontrolled transactions". It was also noted that

while the transfer pricing study report mentions CUP as most appropriate method, the related column in the Form 3CEB states that TNMM (Transaction Net Margin Method) is most appropriate method, even as the assessee subsequently clarifies that it was an inadvertent error to have typed in the TNMM in the place of CUP. It was explained by the assessee that as per the business model adopted industry-wise in respect of this type of transaction, residual profit, after deducting of related transportation cost, is shared equally between the associated parties and arrangement is as much in with the associated enterprises as much it is with the unrelated enterprises. While the TPO was fair enough to place on record the fact that "though it is not denied that in most companies engaged in similar business of logistics and freight forwarding adopt this revenue model but such an arrangement should have been demonstrated by the assessee in black and white along with supporting documents", he did reject this business model as an acceptable evidence of arm's length pricing and proceeded to adopt the Transactional Net Margin Method (TNMM) for determining the arm's length price. In the computation of arm's length price in accordance with TNMM, an arm's length price adjustment of Rs 2,09,00,179, but, for the reasons we will set out in a short while, it is not really necessary to go into fine points about adjustments under TNMM in this case. Suffice to note that CUP was rejected at the assessment stage. Based on the arm's length adjustment so recommended by the TPO, the Assessing Officer proposed to frame the assessment. The assessee was not satisfied with the assessment so proposed by the Assessing Officer and did raise the grievances before the Dispute Resolution Panel but without any success. It was in this backdrop that an arm's length price adjustment of Rs 2,09,00,179 was made in the assessment order. The assessee is aggrieved and is in appeal before us.

4. We have heard the rival contention, perused the material available on record, and duly considered factual matrix of the case in the light of the applicable legal position.

5. We find that in the present case it is not really even in dispute that in this field of business activity, the 50:50 business model (i.e. the business model of sharing residual profits in equal ratio with the service provider at the other end of the transaction i.e. at the consignee's end in the case of export transaction and at consigner's end in the case of import transaction), is a standard practice. In other words, even with respect to the transaction with unrelated parties in this line of activity, it is admitted practice to share the residual profit in equal ratio and that is precisely the assessee claimed to have been adopted with the associated enterprise as well. The trouble however is that while there is a standard formulae for computing the consideration, the data regarding precise amount charged or received for precisely the same services may not be available for comparison. While the assessee is pleading for acceptance of former as a valid comparable under the CUP, the authorities below are of the considered view that availability of precise amount having been charged for precisely the same service is a *sine qua non* for application of CUP method. As this data, about exactly the same amount having been charged for exactly the same service in the uncontrolled transactions, has not been furnished by the assessee, the TPO has held that it is not a fit case for application of CUP and, accordingly, the TNMM, which is usually referred to as method of last resort for computation of arm's length price, has been put in service resulting in impugned ALP adjustment of Rs 2,09,00,179.

6. Undoubtedly, CUP method is the most direct method, unaffected by all extraneous factors, of ascertaining arm's length price of a transaction, and it finds mention in the transfer pricing literature as such. That's the reason wherever it is practical to ascertain arm's length price under this method, all other methods of ascertaining arm's length price relegate into irrelevance. There cannot be, and there is no, dispute on this proposition in principle. The controversy, however, sometimes arises with respect to the functional aspects of CUP method, and the case before us indicates one such dimension.

7. Under rule 10 B (1)(a), the mechanism of determining arm's length price as per the comparable uncontrolled price method is set out as follows:

> **(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;**
>
> **(ii) such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market; and**
>
> **(iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction.**

8. A quick look at the above definition of arm's length price determination does indeed give an impression that unless the amount charged for similar uncontrolled transaction is the same as international transaction between the AEs, the CUP method cannot come into play. In other words, in a case in which the data is not available for price for the same product or service in an uncontrolled situation, the CUP method cannot be applied.

9. In the present case, however, admittedly, the assessee has not even made any efforts to demonstrate nor claimed that actual amount charged for comparable services rendered to, or received from, associated enterprise is the same as in the case of the independent enterprise, but the assessee's case is

that the amount charged for comparable services rendered to, or received from, associated enterprise is computed on the basis of the same residual profit sharing formulae as in the case of the independent enterprise. The connotations of 'price', as set out in rule 10 B(1)(a) are thus required to be taken to be something much broader than the expression 'amount' inasmuch as it is required to cover not only quantification of price in terms of an amount but also in terms of a formulae according to which the price is quantified. The question that we really need to adjudicate upon is whether the mechanism for computing the amount of profit, so agreed upon between the parties, can indeed be taken as a comparable for the purposes of CUP analysis in transfer pricing.

10. This issue is no longer *res integra*. There are at least two reported decisions by very distinguished coordinate benches of this Tribunal dealing with, albeit somewhat indirectly, with this proposition, and both of these benches have upheld application of CUP method in such a situation.

11. In the case of **ACIT Vs Agility Logistics Pvt Ltd (136 ITD 46)**, which was quite a path breaking decision in its impact, perhaps this issue came up for the first time before the Tribunal. That was a case in which the assessee was engaged in the business of 'international freight forwarding by air and sea, logistic activities and customs clearance' and it was 'a corporate policy of the AEs all over the world that after payments of the costs, the profits were shared between the AEs that have participated in the transaction'. In brief, the case of the assessee was that in this peculiar line of business activity, it was a common practice, with associated enterprises as also independent enterprises, that the profits from a transaction, after meeting the direct costs, were shared equally between the parties involved in a transaction. It was thus contended that the arrangements with independent enterprises, entered into by the assessee, constitute instances of comparable uncontrolled transaction and since these transactions were on the same terms as with the associated enterprises, the

transactions entered into with the AEs should be held to be arm's length transactions. This plea was rejected at the assessment stage for a variety of reasons, including the reason that 'the agreements are entered into on a profit split basis and jot on the basis of rate' and, as such, 'there is, in fact, no internal CUP'. The TPO applied the TNMM method and rejected assessee's reliance on CUP method. When the matter travelled in appeal before the CIT(A), it was, *inter alia*, contended that "CUP method is most direct and reliable way to apply the arm's length price and is preferable over all other methods" and that "Since CUP is the most direct method, it should be used to test the arm's length nature of transactions of the assessee. Learned CIT(A) noted that the assessee "had produced agency agreements between the Geologistic group and unrelated parties which are substantially the same" and that "the profit split information contained in all the agreements (50:50) is typical of the industry, i.e. standard formulae for logistics and freight forwarding service providers". Learned CIT(A) was of the view that the TPO had "ignored this crucial aspect of the business as well as orders of his predecessors and hence arrived at an erroneous finding". Learned CIT(A) also referred to, and relied upon, decision of the Tribunal in the case of **ACIT Vs MSS India Pvt Ltd (25 DTR 119)** in support of the proposition that TNMM should be applied only when standard methods, such as CUP, fail. He thus concluded that, "a valid CUP exist for benchmarking the international transaction in this case as conditions are identical" and that "To sum up, the appellant's contention on CUP method supported with third party agreements and the understanding of the comparable level of functions performed, asset used and risk borne by the original company and the destination company has merit. As such I am in agreement that the risk and rewards of the business is to be shared in 50:50 ratio". The matter travelled in further appeal, this time at the instance of the Assessing Officer, before a coordinate bench of this Tribunal. The coordinate bench upheld the stand of the CIT(A) by concluding that "we do not find any infirmity in the CUP method (50:50 module) adopted by the assessee". By implication, thus, the coordinate bench upheld the application of CUP method

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by a comparing a pricing formulae, rather than the pricing quantification in amount- as was considered *sine qua non* by the TPO.

12. In the case of **ACIT Vs DHL Danzas Lemuir Pvt Ltd [TS-752-ITAT-Mum (2012) TP]**, once again a similar issue came up before another coordinate bench. In this case also, the assessee was engaged in the business as a logistic service provider offering, *inter alia*, a comprehensive portfolio of international freight handling services. The *modus operendi* adopted by the assessee was to "enter into contract with third parties for lifting their cargo from source to destination abroad" and the execution of this job involved "lifting of cargo from the place of customers in India, sending it to the Indian port/airport, shipping or airlifting as the case may be to the country of its destination, collecting it from such port/airport of the other country and then supplying it" to the destination entity ultimate buyer. In so far as the activities in India are concerned, these are done by the assessee and the activities abroad are executed by certain foreign entities, with whom the assessee has entered into contracts for this purpose. In the like manner, such foreign entities also undertake shipping/airlifting of cargo from their respective countries. The activities in India, similar to which are performed by such foreign entities in their countries for the bookings made by the assessee in India, are done by the assessee for the bookings made by such foreign entities abroad. The total direct expenses incurred in India by the assessee and abroad by the foreign entities were aggregated and then reduced from the gross receipts. The residual was shared in the ratio of 50:50 between the entity of origin country and the entity of destination country. Initially, the assessee had adopted the TNMM but subsequently, vide letter dated 3rd October, 2006, the assessee pleaded for adoption of CUP method stating that the terms and conditions applicable to the companies were the same for agents and third parties affiliates. However, TPO did not accept this plea. In appeal, learned CIT (A) upheld the stand of the assessee. When Assessing Officer carried the matter in further appeal, a

coordinate bench, adjudicating upon the grievances so raised by the Assessing Officer, held as follows:

> **6. The short controversy before us is to determine the ALP in respect of transactions between the assessee and its AEs towards receipt/payment of freight. The assessee shared profit in the ratio of 50:50 both on the payments made by it and the receipts of freight from its AEs. We have perused the submissions and the finding of the learned CIT (A) on the functions performed, assets employed and risk undertaken by both the AEs in such transactions. The learned DR could not controvert such finding that the functions performed, assets employed and risk undertaken in both the AEs is same. The assessee paid certain sum to its AEs abroad for doing the work similar to which it did for which it received freight revenue from its AEs. The crux of the matter is that in both the situations, the total receipts are taken on one hand, from which all the expenses incurred in connection with the transportation of cargo in both the countries are excluded. The remaining amount is distributed between the entity of origin country and the entity of destination country in equal share. As the assessee has earned/paid revenue from/to its AEs in the same proportion, in our considered opinion, the transactions have been recorded at arm's length price and there was no justification for making such addition. We do not see any reason to interfere with the impugned order.**
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> **7. The learned counsel for the assessee has placed on record copies of the orders passed by the Tribunal in the case of ACIT vs. M/s Agility Logistics Pvt. Ltd. for assessment years 2004-05 to 2006-07. In these two separate orders, the facts are almost similar whereby various agency agreements were entered into between the company**

> **of origin country and the company of destination country in the business of logistics service provider. The revenues were shared between the two in the ratio of 50:50. The Tribunal has accepted the sharing of profit in the equal proportion at arm's length price. The ld. DR could not distinguish the facts of that case vis-a-vis the case in hand. Respectfully following the precedent, we uphold the order passed by the learned CIT (A).**

13. In both of these cases, thus, it was concluded that even in a situation in which the comparables were the formulas on the basis of which exact quantification for price of services was done, the same could be accepted as a price for the purposes of application of CUP method of ascertaining arm's length price. The approach so adopted, even if somewhat serendiptuous, was quite remarkable, pragmatic and in due deference to the realities of businesses. In the peculiar circumstances of this case, when connotations of 'price' under rule 10B(1)(a) are treated to include not only an amount stated in monetary terms but also a mechanism in terms of a formulae to arrive at consideration, such an interpretation is certainly a very purposive and realistic interpretation.

14. The conclusion so arrived, even without the benefit of too elaborate a discussions on the legal framework enabling such, what may seem at the first sight, extended meaning to the expression 'price', meet our considered concurrence. In coming to this conclusion, we may have different, or many different, sets of specific reasons, as analysed elsewhere in this order, but that does not dilute our highest respect for these judicial precedents from the coordinate benches.

15. It is useful to bear in mind the fact that as against the use of expression 'amount' in the US Transfer Pricing Regulations[1] dealing with CUP analysis,

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[1] *Interestingly, unlike the reference to 'price' as a comparator in the Indian TP regulations, OECD Transfer Pricing Guidelines and UN Transfer Pricing Manual, US transfer pricing regulation*

which have pioneered transfer pricing legislation worldwide, our domestic transfer pricing regulation, as against the OECD Transfer Pricing Guidelines[2] and as against UN Practical Manual on Transfer Pricing for Developing Countries[3], use the expression 'price' in the comparability element. While normally, the expression 'price' and 'amount' as comparability element do not lead to different connotations, since price is expressed in terms of an amount and, therefore, whether the comparability element is taken as 'price' or as 'amount', it means the same thing. In other words, connotations of expression 'price' and 'amount', as a comparator, are materially the same as long as price is stated in terms of an amount and that is the standard practice almost, well almost, universally.

16. There are, however, occasions, as in the case before us, when agreed price of a service rendered to, or received from, an associated enterprise is not stated in terms of an amount but in terms of a formulae which leads to quantification in amount.

17. On a conceptual note, it is not really essential that price of a commodity or service must always be quoted in terms of an amount. 'Price', in economic and business terms, could be interpreted as reward for functions performed, assets employed and risks assumed, while 'amount', in economic and business

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1.482-3(b) refers to 'amount' as a comparator as it states that, ***"(t)he comparable uncontrolled price method evaluates whether the amount charged in a controlled transaction is arm's length by reference to the amount charged in a comparable uncontrolled transaction"****.*

[2] *OECD Transfer Pricing Guidelines 2010 recognizes mechanism of CUP method, in paragraph 2.13, as* ***"(t)he CUP method compares the price charged for property or services transferred in a controlled transaction to the price charged for property or services in a comparable uncontrolled transaction in comparable circumstances"***

[3] *UN Practical Manual on Transfer Pricing for Developing Countries, in paragraph 6.2.1.1 recognizes the working mechanism of CUP method by stating that "****(t)he Comparable Uncontrolled Price (CUP) Method compares the price charged for property or services transferred in a controlled transaction to the price charged for property or services transferred in a comparable uncontrolled transaction in comparable circumstances****".*

terms, is a relatively mundane quantification in terms of a currency. As economic principles recognize, price can even be in terms of a formulae to arrive at the amount which is paid or received as a consideration for the commodity or service in question, and there cannot be a better example of this phenomenon than interest rate, which are frequently used in CUP analysis, as a measure of computing the amount rather than the amount itself. Other examples can be found in pricing financial derivatives and other financial assets. For instance the price of inflation-linked government securities in several countries is quoted as the actual price divided by a factor representing inflation since the security was issued. The examples can be endless but the common thread in all these examples could be the reality that the expression 'price', in certain situations, extends well beyond the specific amounts. In certain business models, a business associate performs the services in consideration of sharing residual profits in a certain manner, and, as such, the price for those services would be this share in the residual profit.

18. Viewed thus, the stand taken by the authorities that CUP cannot be applied in such cases, because of non availability of data in terms of comparable amount having been charged for the same service, loses its relevance. Be that as it may, for the reasons we will set out in a short while, even this aspect of the matter may be somewhat academic at this stage.

19. It is also important to bear in mind the fact that what we are dealing with at present is a classic case in which while there is no, and there cannot be any, dispute, even at the assessment stage, that the terms at which the assessee has entered into the arrangements with the AEs are the same as the terms at which the assessee has entered into arrangements with the independent enterprise, there are still some procedural issues, with regard to application of methods of determining arm's length price as set out in rule 10B. Here is a case in which

there is no dispute that the price determination for all business associates, whether associated enterprises or independent enterprises, is on the same terms and as per the same business model, which is admittedly unique to that line of business, but, owing to the limitations of the methods prescribed under rule 10B(1)(a) to (e), as the prescribed methods of determining the arm's length price existed at the relevant point of time, there are certain, what can at best be described as, unresolved procedural issues.

20. Let us not forget the fundamental fact that transfer pricing, by itself, is not, and should not be viewed as, a source of revenue; it is an anti-abuse measure in character and all it does is to ensure that the transactions are not so artificially priced, with the benefit of *inter se* relationship between associated enterprises, so as to deprive a tax jurisdiction of its due share of taxes. Our transfer pricing legislation as also transfer pricing jurisprudence duly recognize this fundamental fact and ensure that such pedantic and unresolved procedural issues, as have arisen in this case due to limitations of the prescribed methods of ascertaining arm's length price, are not allowed to come in the way of substantive justice, particularly when it is beyond reasonable doubt that there is no influence of intra AE relationship on the determination of prices in respect of intra AE transactions.

21. While on this subject, it will be appropriate to take note of some very thoughtful and very well articulated observations made by a coordinate bench of this Tribunal, in the case of **Ascendas India Pvt Ltd Vs DCIT (143 ITD 208)**. These observations are reproduced below:

> "…………the purpose of enactment of Chapter X, is to benchmark an international transaction with the Fair Market Value of such transaction, so as to ensure that there are no profit transfers between parties in different jurisdictions effectually circumventing taxes. Thus, purpose of

transfer pricing rules, is to verify whether the prices at which an international transaction has been carried out is comparable with the market value of the underlying asset or commodity or service. **It may be true that difficulties might arise in ascertaining the fair market value, but such difficulties should not be a reason for not adapting the rules and methods prescribed in this regard. This might require some subtle adjustments in the methodology prescribed for evaluation of an international transaction. A water-tight attitude of interpretation of the prescribed methods will defeat the very purpose of enactment of transfer pricing rules and regulations and also detrimentally affect the effective and fair administration of an international tax regime'.** *[Emphasis by underlining supplied by us]*

22. Viewed thus, adopting a pedantic approach in determination of arm's length price, which serves letter of the law but leads to the conclusion diametrically opposed to the spirit of the law, has to be deprecated. We are in considered agreement with this school of thought. To that extent, the methods of determination of arm's length prices have to be essentially implemented in a reasonable and pragmatic manner so as to achieve its laudable objectives without any collateral damage.

23. The lawmakers have also not been oblivious of this compelling need of a certain degree of flexibility in the methods of determining arm's length price. Central Board of Direct Taxes, vide notification dated 23rd May 2012, has introduced, in addition to Comparable Uncontrolled Price (CUP) method, Resale Price Method (RPM), Cost Plus Method (CPM), Profit Split Method (PSM) and Transactional Net Margin Method (TNMM), the following additional method:

"………………any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the

same or similar uncontrolled transaction, with or between non-associated *(i.e. independent)* **enterprises, under similar circumstances considering all the relevant facts".**

24. Very significantly, the above method, which is only method prescribed under 'any other method' under section 92C(1)(f) read with rule 10B(1)(f) , is not a residual method in the sense that it is not a condition precedent for the application of this method that all other methods, i.e. methods set out in section 92C (1)(a)to 92C(1)(e) and as elaborated under rule 10B(1)(a) to (e), must fail and only then this method can be applied. This method is at par with all other methods of determining the arm's length price, as set out in sections 92C(1)(a) to (f), and, in terms of Section 92C(2), the most appropriate method, referred to in Section 92C(1), "shall be applied, for determination of arm's length price, in the manner prescribed". Therefore, as long as the method covered by rule 10AB, which is duly covered by Section 92C(1) satisfies the test of being the 'most appropriate method', it can be applied to a fact situation. There is clearly no bar on its applicability just because a method specified in rule 10B, even if indirect method like TNMM, can also be applied to the same. Quite to the contrary, as noted by the coordinate benches in the cases of **ACIT Vs. MSS India Pvt Ltd** *(supra),* direct methods, such as CUP and the 'other method' under rule 10B which, as we will see in a short while, is only a variant of the CUP method, have an inherent edge over indirect methods, such as TNMM, and, therefore, as long as it is possible to do so, a direct method of ascertaining the arm's length method should be applied. In the case of **Serdia Pharmaceuticals Pvt Ltd Vs ACIT (44 SOT 391)**, a coordinate bench of the Tribunal has observed that,"....**even as the transfer pricing legislation does not provide for an order of preference of methods of determining ALP, such an order of preference being drawn up is an integral, though somewhat subliminal, part of the process of determining the ALP"** and that whenever a direct method of ascertaining arm's length price can be used, it should be preferred over an indirect method. In view of these discussions, method under rule 10BA,

which is a direct method of ascertaining arm's length price- as is the case with Comparable Uncontrolled Price (CUP) method, Resale Price Method (RPM) and Cost Plus Method (CPM), has an inherent edge over indirect methods such as Transactional Net Margin Method (TNMM) and Profit Split Method (PSM).

25. In effect, thus, it would appear that as long as one can come to the conclusion, under any method of determining the arm's length price, that price paid for the controlled transactions is the same as it would have been, under similar circumstances and considering all the relevant factors, for an uncontrolled transaction, the price so paid can be said to be arm's length price. As we have noted earlier in this order, the price need not be in terms of an amount but can also be in terms of a formulae, including interest rate, for computing the amount. In any case, when the expression '**price which….would have been charged on paid**" is used in rule 10BA, dealing with this method, in this method the place of "**price charged or paid**", as is used in rule 10B(1)(a), dealing with CUP method, such an expression not only covers the actual price but also the price as would have been, hypothetically speaking, paid if the same transaction was entered into with an independent enterprise. This hypothetical price may not only cover *bonafide* quotations, but it also takes it beyond any doubt or controversy that where pricing mechanism for associated enterprise and independent enterprise is the same, the price charged to the associated enterprises will be treated as an arm's length price. In this view of the matter, the business model said to have been adopted by the assessee, in principle, meets the test of arm's length price determination under rule 10BA as well.

26. No doubt, rule 10BA as also the corresponding enabling rule 10B(1)(f) are inserted by the Income Tax (Sixth Amendment) Rules 2012 and are specifically stated to be effective from 1st April 2012, i.e. assessment year 2012-13 onwards. However, in Hon'ble Supreme Court's five judge constitutional

bench's landmark judgment, in the case of **CIT Vs Vatika Townships Pvt Ltd (2014 TIOL 78 SC),** the legal position in this regard has been very succinctly summed up by observing that **"(i)f a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect"** Hon'ble Supreme Court has observed that **"This** *(the foregoing analysis)* **exactly is the justification to treat procedural provisions as retrospective".** Their Lordships then further observed that, "**In *Government of India & Ors. v. Indian Tobacco Association (2005) 7 SCC 396* the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation"** and that **"The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of *Vijay v. State of Maharashtra & Ors. (2006) 6 SCC 286.* It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature."** Their Lordships also noted that this retrospectively being attached to benefit the persons, is sharp contrast with the provision imposing some burden or liability where the presumption attaches towards prospectivity.

27. It may appear to be some kind of a dichotomy in the tax legislation but the well settled legal position is that when a legislation confers a benefit on the taxpayer by relaxing the rigour of pre-amendment law, and when such a benefit appears to have been the objective pursued by the legislature, it would a purposive interpretation giving it a retrospective effect but when a tax legislation imposes a liability or a burden, the effect of such a legislative provision can only be prospective. What logically follows from the law so settled by a constitutional bench of Hon'ble Supreme Court, is that the operation

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of rule 10BA, which confers the benefit of an additional method of ascertaining arm's length price and, *inter alia,* relaxes the rigour of CUP method, can only be retrospective in effect. In our considered view, therefore, rule 10BA is to be held as effective from 1st April 2002, i.e. the time when transfer pricing provisions were introduced in India.

28. In view of the above discussions, the conclusion arrived at by the coordinate benches meets our considered approval not only because of our respect for the pioneering work done by the coordinate benches but also because of our analysis elsewhere in the order and the subsequent developments, in jurisprudence as also in legislative field, supporting the conclusions arrived at by the coordinate benches. The business model of 50:50, as was admittedly prevalent in the line of business activity of the assessee and as is followed by the assessee, thus indeed satisfies the test for determination of arm's length price.

29. For the reasons set out above, as also respectfully following the esteemed views of the coordinate benches, we uphold the grievance of the assessee. We hold that the assessee's contention to the effect that the arm's length price of services rendered to, or received from, the associated enterprises, which was computed on the basis of the same 50:50 model as is the industry norm and as has been employed by the assessee for computing similar services to the independent enterprises, was at arm's length. Accordingly, the impugned arm's length price adjustment of Rs 2,09,00,179 stands deleted.

30. In view of the fact that the above issue has been decided in favour of the assessee, all other grounds of appeal are rendered academic, and, as such, it is not really necessary to deal with the same on merits. In any case, neither

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learned counsel press those grounds of appeal nor raised any arguments in support of the same.

31. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on 18th day of November, 2014.

Sd/xx *Sd/xx*
C M Garg **Pramod Kumar**
(Judicial Member) (Accountant Member)
New Delhi. th day of November, 2014

Copies to :
(1) The appellant
(2) The respondent
(3) Commissioner
(4) DRP
(5) Departmental Representative
(6) Guard File

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Delhi benches, New Delhi

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