

आयकर अपीलीय अधिकरण "K" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI
BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.228/Mum/2016

(निर्धारण वर्ष / Assessment Year : 2011-12)

M/s. G.S Caltex India P. Ltd. 215, Altrium, "C"Wing, Unit No. 816/817, 8 th floor, Chakala, Andheri Kurla Road, Andheri (E), Mumbai-400059	बनाम/ v.	Deputy Commissioner of Income-tax, Circle 2(1)(2), Aayakar Bhawan, M K Road, Mumbai-400020
स्थायी लेखा सं./ PAN : AADCG6605R		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:		Shri. Ajay R. Singh
Revenue by :		Shri Jayant Kumar, CIT-Dr & Ms. Pooja Swarup

सुनवाई की तारीख /Date of Hearing : 09.03.2018

घोषणा की तारीख /Date of Pronouncement : 01.06.2018

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 228/Mum/2016 , is directed against the assessment order dated 23.12.2015 passed by learned Assessing Officer u/s 143(3) r.w.s. 144C(13) of the Income-tax Act,1961 (hereinafter called " the Act") for assessment year 2011-12 which is passed in pursuance to Directions dated 27.10.2015 issued by Disputes Resolution Panel-1, Mumbai (hereinafter called "the DRP") u/s 144C(5) of the 1961 Act , the proceedings had arisen before DRP from draft assessment order dated 06-02-2015 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) r.w.s. 144C(1) of the 1961 Act for AY 2011-12 which was issued in pursuance to order passed by Transfer Pricing Officer, 2(1)(1),Mumbai dated 30-01-2015 u/s 92CA(3) of the 1961 proposing transfer pricing adjustment to Arm's length price on account of international transaction to the tune of Rs. 8,59,99,908/-.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

"1. The learned DRP erred in directing the AO in selecting the TNMM method and rejected the cost plus method adopted by the assessee, without appreciating the fact that the assessee company is a new company and it's the first year of business operation, therefore cost plus method was rightly applied by the assessee on the basis that comparative invoices available to establish the Arm's length price. Though the customers were spread at a different geographical distance, the assessee derived the rate for comparison at the Port of origin after excluding freight expenses and packing costs.

(2) The learned DRP erred in directing the AO in selecting the companies for comparable analysis under TNMM METHOD which were branded and established old companies having existence in Indian market over a period 28 years and 50 years dealing in variety of product ranges, therefore the comparables selected by the TPO are to be rejected and the transfer pricing adjustment made of Rs 8,59,99,908 /- be deleted.

(3) The learned DRP erred in directing the AO to calculate the Average OP/TC of the selected company as a whole instead of calculating the OP/TC of only Lubricant Segment without appreciating that the selected Financials of GS Caltex India Private Limited since GSIPL is only into Lubricant business.

(4) The learned DRP has ignored the facts that the selected companies are not only dealing with lubricant oil but also into other diversified business; For example - Sah petroleum is in the business of Transformer oil, White oil, Process oil etc and Gulf oil is in the Business of Industrial explosive and Detonators, Mining and Infrastructure etc which obvious from the financial of those companies, thus the transfer pricing adjustment made of Rs 8,59,99,908 /- on basis of the above two comparables cannot be sustain.

(5) The Assessee craves leave to add, amend, alter or delete any or all the above grounds of objections."

3. The assessee is engaged in business of procuring/importing lubricants in bulk from its parent company G.S.Caltex Corporation, South Korea which holds 100% shares of the assessee company and selling in India to its customers after repacking in small packs of 910 ML to 210 ltrs . The assessee's international transactions with its AE's was referred by AO to Transfer Pricing Officer(TPO) u/s. 92CA(1) of the Act. The TPO observed that assessee is repacking in small packets of lubricating oils of 910 ml. to 210 ltrs. manufactured from the lubricating oil imported from its AE in bulk packs/flexi packs of 20,000 ltrs. which are then sold to customer in Indian

market in small packs. The international transactions reported by the assessee in its TP study is as under:-

Sr.no	Nature of international transaction	Quantity	Total CIF Value (In. Rs.)
1.	Lubricants in Flexi Bags -Purchases -Royalty -Interest	3880298 Ltrs	18,92,59,403/- 2,10,848/- 3,38,439/-
	Total		18,98,09,690/-

The TPO observed from the TP study report that the AE is manufacturer of base oil which assumes less than market risks associated with carrying out the business because the basic raw material being base oil is manufactured by its AE which is used for manufacturing lubricating oil which bring down its cost of production. Secondly, the TPO observed that the AE got the assurance of selling lubricating oil in Indian market and around the world through its subsidiaries/associated companies, thus having assured access to huge market. Thus it was observed by TPO that AE of the assessee manufactures mass production of lubricating oil which has helped in reducing cost of production of oil. Thirdly, the AE is having full automatic plant of manufacturing lubricating oil which help in reducing cost of production of AE. The TPO observed that in TP study report, the AE was selected as a tested party to determine the Arm's Length Price(ALP) of the international transactions entered into by the assessee by adopting cost plus method which was considered by the assessee to be preferred method for determining/computing Arm's Length Price. The assessee purchases its raw material like finished lubricating oil from its AE which is also supplied by its AE to other customers in South East Asian Countries such as Bangladesh, China, Japan etc.. The TPO observed that the assessee while claiming to use cost plus method for computing ALP has compared the prices charged by its AE to customers in these countries. The TPO observed that the AE has given volume discount to assessee vis-a-vis other buyers in China, Japan, Bangladesh etc. because assessee is the sole distributors in India. The TPO observed that the assessee while adopting cost plus method as the most appropriate method to compute ALP of international transactions of import

of finished lubricating oil has compared prices of finished product supplied by its AE to other buyers in South East Asian Region i.e. Nepal, Bangladesh, China etc. and assessee has compared prices after making adjustments in freight, packing material etc. as under:-

COMPARATIVE ANALYSIS BETWEEN THE PRODUCTS SUPPUED TO GSIPL AND OTHER THAN GAIPL										
Items no	Comparab le items sold to country	Name	Package	CIF N/S Price, S/Pack age	FQBBus an Price, S/Packa ge	Package Cosi. KfW (USD/1120)	Converted FOB w/o package, S/L	Latest Invoice /Orders	Volume Taken So far	Remarks 35 to why prices to India are reasonable and at arm's length
i	India	Ki xx Dynamic CH-4 15W/40	Flan-Tank, L	1.17	1.11	670,000	1.08	Jul.2010	440000	Quantity bought by us ate larger and in bulk where as other country volumes are very low. Also we have to keep m mind that other than packing cost, margins are higher in smaller packs for all the products in the market.
l	Nepal	Ki «x DYNAMIC CG-4 15W/40	3/6 L BOX	28.17	2S.76	4,000	1.23	Jan. 2010	3450	
i	Ghana	Kiw DYNAMIC CH-4 15W/40	2001. DRUM	280.76	257.20	30,000	1.15	Mar. 2010	5000	
2	India	Kin* Dynamic CF -4 20W/40	Fleig-Tank, L	1.12	1.07	670,000	1.04	Jul.2010	360000	Quantity bought by us are larger and in bulk where as other country volumes are very low. In fact Ghana is supplied this product cheaper
2	Nepal	Kixx DYNAMIC CF-4 15W/40	4/4 L BOX	28.01	27.79	4,000	1.51	Jun 2010	4250	
2	China	HHIC ENGOIL 15W/40 CF-4 (2)	20L PAIL	28.40	28.02	3,700	1.24	Jul.2010	25000	
3	ndia	KiwGoldSGZOW/SO	Flea-Tank, L	1.17	1.10	670,000	1.08	Jul.2010	80000	Quantity bought by us a re larger and in bulk where as other country
3	Nepal	KixxGoldSF/CF20W/50	4/4 L BOX	26.69	26.48	4,000	1.43	Jun. 2010	44560	
4	India	<3S Ultra 4T5L20W/40	Flen-Taok, L	1.18	1.11	670,000	1.09	Jul.2010	80000	Quantity bought by us atelaigerand in bulk where as other country
4	Nepal	GS ULTRA IT 15W/40	l2/1L3OX	19.40	19.25	^ 5,000	1.23	Jun. 2010	22440	
5	India	GS Hydro 68	Flexi-Tank, L	0.91	0.87	670,000	0.84	Mar. 20 10	120000	Quantity bought by us a re larger and in bulk where as other country volumes are very low. Also the supplies to China is done by Korean Local Distributors after keepi ng their own margins
5	China	DICC HYDRAULIC 01L46(1)	Field-Tank, L	1.08	1.07	670,000	1.04	Jul.2010	60000	
S	China	HHICHYOIL46(2)	200L DRUM	2S1.50	248.10	30,000	1.11	Jul. 2010	38000	
6	India	New Golden Pparl 3	180kg DRUM	31600	300. SO	30,100	1.52	Jul 2010	103BB9	Quantity bought by ^ are much larger than other countries and also grease bought by Ghana is EP 2 grease not NLG13.
6	Nepal	NewGoldenPearl3	24/0.5KGB OX	33-47	30.60	12,400	1.63	Jan. 2010	1350	

The TPO observed that the assessee is contending that the prices paid by it to its AE is at ALP keeping in view price charged by its AE to customers in other countries and keeping in view normal range of +/-5%. The assessee had claimed that it got better price than the price charged by its AE to customers in other markets . The TPO observed that the assessee while claiming to use cost plus method for computing ALP has compared the prices charged by its AE to customers in these countries and in-fact the assessee used comparable uncontrolled prices(CUP) as the method of benchmarking to compute ALP and not the cost plus method as stated in its TP study report. The TPO observed that CUP method requires close comparability. The CUP method is to be applied when assessee and the AE are located in same geography and comparable should match in quantity and quality . Further as per TPO , CUP method is suitable when time period of transactions should be same while in the instant case time period of transaction of AE with customers in other countries is not known . The TPO observed that the assessee's AE has sold different products with different description/technicalities in different markets and hence they are not strictly comparables with the products supplied by AE to the assessee . Secondly different scales(volume) of supplies were made in different markets and hence comparison cannot be made between these markets who have different scales of consumptions . Thirdly, there are different geographies which are not strictly comparable. The TPO observed that the assessee is infact following CUP (comparable uncontrolled price) method while the assessee is describing the same to be cost plus method in its TP study. The TPO observed that the CUP method is not the most appropriate method under the given circumstances . The TPO relied upon the decision of Mumbai-tribunal in the case of Gharda Chemicals Ltd. v. DCIT (2010) 35 SOT 406 (Mum), which led him to reject CUP method and adopt TNMM method considering the same to be the most suitable method for computing Arm's Length Price under the given circumstances because the TNMM method tests the arm's length character of transfer prices in the controlled transactions by comparing the operative profit earned by the tested party in the controlled transactions under examination to operating profit earned by tested parties in its similar transaction with uncontrolled parties. Thus the TNMM measures the total returns derived from controlled tax payer's most narrowly defined business activity for which reliable data incorporating the

controlled transaction under review is available. It was observed by the TPO that the strength of the TNMM is that net margins are less affected by the transactional difference. The TPO adopted TNMM method to be used as the most appropriate method. The assessee was confronted by TPO and the assessee justify cost plus method as adopted in its TP study report. The TPO selected three comparables based on search of capitaline data bases which led him to shortlist three comparables namely as under:-

- i. Castrol India Ltd.
- ii. Gulf Oil Corporation Limited
- iii. Sah Petroleum Ltd.

The comparable Castrol India Ltd. itself was dropped by TPO after considering the reply/objections of the assessee and finally two comparables were shortlisted namely Sah Petroleum Ltd. and Gulf Oil Corporation Ltd. and the Profit Level Indicator(PLI) of the two companies are detailed as hereunder:-

	Sah Petroleum Ltd (In Rs.)	Gulf Oil Corporation Limited (In Rs.)
Sales	373,34,29,331	901,27,13,000
Cost	349,05,50,116	868,85,00,000
Advances & Deposits	2,07,12392	
Total Cost	351,12,62,508	
Operating Profit	22,21,66,823	32,42,00,000
OP/TC	6.32%	3.73%
...		
	Average	5.02%

The working of assessee's PLI being OP/TC is as under:-

Sales(In Rs.)	29,04,65,103
Cost(In Rs.)	35,84,69,826
Loss(In Rs.)	(35, 84,69, 826)
OP/TC	-18.97%

The average margin of the comparable is 5.02% while that of the assessee is (-) 18.97%. Hence the transaction was not considered to be at arm's length and the Arm's Length Price was determined as under by the TPO:-

1	Total Sales of the assessee(In Rs.)	29,04,65,103
2	Cost(In Rs.)	35,84.69,826
3	Loss(In Rs.)	(6,80,04.723)
4	OP/TC (3/1)	-18.97%
5	Average markup of comparables	5.02%
6	Arm's Length Value (2X5)(In Rs.)	1,79,95,185
7	Adjustment (6-1)(In Rs.)	8,59,99,908

(In Rs.)

The average OP /TC was 5.02% of these two comparable entities , while OP/ TC of the assessee was (-) 18.97% which led to the additions of Rs. 8,59,99,908/- towards TP adjustments on account of international transaction and adjustments was proposed by TPO to ALP vide orders dated 30.01.2015 passed u/s. 92CA(3) of the Act. The said TPO order dated 30.01.2015 led to the framing of draft assessment order dated 06.02.2015 passed by the AO u/s. 143(3) r.w.s. 144C(1) of the Act, which led to the additions in the hands of the assessee by way of Arm's Length Price adjustment to the international transaction entered by the assessee with its AE to the tune of Rs. 8,59,99,908/- .

5.The assessee aggrieved by the draft assessment order dated 06-02-2015 passed by the AO filed objections with the Dispute Resolution Panel-1 , Mumbai objecting to the selection of TNM method for computing ALP and also objecting to the selection of the comparables which found mentioned in the grounds of objection filed by the assessee before DRP , which read as under:-

'The learned TPO has erred in selecting the TNMM method and rejected the cost plus method adopted by the assessee, without appreciating the fact that the assessee company is a new company and it's the first year of business operation, therefore cost plus method was rightly applied by the assessee on the basis that comparative invoices available to establish the Arm's length price. Though the customers were spread at a different geographical distance, the assessee derived the rate for comparison at the Port of origin after excluding freight expenses and packing costs.

The learned TPO erred in selecting the companies for comparable analysis under TNMM METHOD which were branded and established old companies having existence in Indian market over a period 28 years and 50 years dealing in variety of product ranges, therefore the comparables selected by the TPO are to be rejected and the transfer pricing adjustment made of Rs 8,59,99,908/- be deleted.

The learned TPO has erred in calculating the Average OP/TC of the selected company as a whole instead of calculating the OP/TC of only Lubricant Segment without appreciating that the selected companies are also into other diversified business. Hence the company selected and data available were not comparable with the Audited Financial of GS Caltex India Private Limited since GSIPL is only into Lubricant business.

That the learned TPO has ignored the facts that the selected companies are also into other diversified business For example - Sah petroleum is in the business of Transformer oil, White oil, Process oil etc and Gulf oil is in the Business of Industrial explosive and Detonators, Mining and Infrastructure etc thus the transfer pricing adjustment made of Rs.8,59,99,908/- on basis of the above two comparables cannot be sustained"

The assessee main contentions before DRP are reproduced hereunder:-

" 2.8 In the proceedings before the DRP, the assessee has submitted that assessee's comparison with Sah Petroleum Ltd and Gulf Oil Corporation is also to be ruled out even though they are in the business of lubricating oil. The reason given by the assessee for this is that Sah Petroleum Ltd is 28 years old and Gulf Oil Corporation is 50 years old company with a Capital Investment in Fixed Assets of Rs.46 crs and Rs.518 crs. respectively. Both the companies are having its own

blending plant and having mass production of Lubricating Oil and greases. Their total Sales volume of Lubricating oil is 63236 KL and 52767 KL per annum respectively. Its products are being sold on the Brand name of IPOL and Gulf, hence easily saleable product in the market. It has market share of at least 2% of the Lubricating oil market in India. Their spending on media and marketing is very high due to which their products known to the public and can be sell easily in the market. Sah petroleum is basically into trading of white oil business and caters to the Pharmaceutical industry; their volume is also huge compared to GSIPL.

2.9 On the other hand, GSIPL is a new company with a one year of its existence. It doesn't not have own manufacturing plant and pays the processing fees of fixed amount to the job worker up to 600 KL of production. Hence the cost of production goes up because of less production during 1st year of operation. Sales volume is just 2378 KL p.a. i.e. average 200 KL month, hence fixed processing charges have eaten away and impacted the Gross Margin which indirectly affected OP/OC before depreciation on cost. It's Establishment, Administrative and selling costs are also high because of new admissions of employees, Business promotion expenses etc. which directly impact the bottom line of the company. Sah Petroleum and Gulf Oil having other business activities of white oil trading apart from Lubricating oil which has nothing to do with the business promotion or marketing spend as these products are directly sold to the industrial customers. Hence, percentage of marketing expenses to sales is very low compared to GSIPL. All these factors are playing very vital role in GSIPL because of a new company in comparison to old established above named companies.

2.10 Comparing the above two companies with GSIPL is unjustifiable due to the years of existence, plant capacity of production, volume of sales, product range, Brand name of the company in the market, Spends on Media and Marketing etc are factors which hit the company's Operating Margin.

2.11 In view of the above the transfer pricing adjustment made by the TPO is unjustified.”

Thus, in nut-shell the assessee contended before DRP that TP adjustments made by the TPO are unjustified and not sustainable in the eyes of law. The DRP considered the objections of the assessee and rejected the same by issuing directions dated 27.10.2015 u/s. 144C (5) of the Act as under:-

“2.12 Directions of the DRP:

We have considered the facts of the case and the submissions made by the assessee. We find the action of the TPO of selecting the TNMM method and rejecting the cost plus method to be in order since the cost of the product is not available in the Indian geography and market and, more particularly at the aseesees's premise/gate for comparison

purpose. The same is applicable also for the comparables selected by the assessee. It is also relevant to note that no data is available for CUP and RPM and the only method left is TNMM. The TPO has, therefore, correctly chosen the TNMM for benchmarking the international transaction of the assessee. The TPO has also given detailed reasons for rejecting the method employed by the assessee for benchmarking the international transaction with which we agree. It may also be mentioned that the prices charged to other customers by AE and used as CUP cannot be so regarded since the other customers are not independent customers but they are also other AEs of the assessee and the group.

2.13 As regards the objection of the assessee that the TPO has selected companies which were branded, old and established companies dealing in variety of products and, hence, the comparables selected by the TPO should be rejected, we are of the opinion that even if the assessee company is a new company, the CALTEX brand is a known and established brand in the field of lubricants in India and has been in existence for a number of years. Hence, the product in which the assessee company is dealing is an established product in the Indian market having a brand value and visibility. CALTEX brand is also known worldwide. Therefore, the fact that the assessee is a new company as compared to the comparables will have no material impact as far as the comparability is concerned since the customers would be buying a brand rather than being swayed by the company which is selling the brand. This objection of the assessee is, therefore, not tenable. Hence, the same is dismissed.

2.14 As regards the objection of the assessee that the TPO has erred in calculating the average OP/TC of the selected company as a whole instead of doing so of only the lubricant segment, especially when the comparables are into other diversified business thus rendering the data available as not comparable, we are of the opinion that the major and substantial segment in which the assessee and the comparables are engaged is lubricant oil. In TNMM, it is the broad comparability which is required to be seen. In any case, in the course of the hearing, the assessee was requested to get the segmental data of the comparable companies for calculation of average operating margin of lubricant division. The assessee has, however, informed that on going through the balance sheet of the companies, it is noticed that no segmental reporting was available in the case of Sah Petroleum Ltd whereas in the case of Gulf Oil Corporation Ltd, the segmental reporting does not reveal a true picture of the segment since the data reflected is inclusive of all income and expenses. From the submissions of the assessee, it is clear that it has not been able to show the extent of the business of the comparables in segments other than lubricant oil. The assessee has, therefore, not been able to show that the comparable companies were engaged in any other segment on a substantial basis. The objection of the assessee is, therefore, rejected in view of the aforesaid reasons.

13. The Assessing Officer shall give effect to the above directions as per the provisions of Section 144C (13) of the I.T Act, 1961.”

Thus in nutshell DRP confirmed the additions as were made by the TPO to the tune of Rs. 8,59,99,908/- by way of adjustments to the ALP of the international transactions entered into by the assessee with its AE . The directions issued by DRP dated 27.10.2015 led to the passing of the assessment order dated 23.12.2015 passed by the AO u/s. 143(3) r.w.s. 144C (13) of the 1961 Act.

6. Still aggrieved , the assessee has come in an appeal before the tribunal . The Ld. Counsel for the assessee submitted before us that the issue in this appeal is with respect to the two comparables selected by TPO namely Gulf Oil Corporation Limited and Sah Petroleum Ltd. It was submitted that this is first year of business of assessee company and the assessee is 100% subsidiary of G.S Caltex Corporation , South Korean . The assessee imports lubricating oils from parent company in barrel of 20,000 ltrs which were converted in small pouches of 910 ml. To 210 ltrs. and it was submitted that originally there were three comparables selected by the TPO namely, Castrol India Ltd., Gulf Oil Corporation Limited , Sah Petroleum Ltd.. It was submitted that the assessee did not offered any comparables and assessee applied cost plus method to compute ALP . it was submitted that Castrol India was not finally taken as comparables by TPO. It was submitted that it is first year of operation of the assessee and Sah Petroleum Limited is 28 years old company while Gulf Oil Corporation Limited is more than 50 years old company . Our attention was drawn to page no. 57 to 123/ paper book filed by the assessee with the tribunal wherein the audited Balance Sheet of Sah Petroleum Ltd. is placed and it was submitted that Sah Petroleum Limited is a leading manufacturer of lubricating oil . It was also submitted that the audited Balance Sheet of Gulf Oil Corporation Limited is placed in paper book at page no. 125 to 212. It was submitted that these companies have various segments and lubricating oils is one of the segments It was submitted that TPO erred in taking the overall profits of these companies for making comparison . It was submitted that this is the first year of operation of the assessee company and there were certain extra ordinary expenses which were incurred such as infrastructure cost, costs incurred for hiring new employees etc. . Our attention was drawn to the decision of Hon'ble Bombay High Court in the case of CIT v. Pentair Water India P. Ltd. (2016) 281 ITR 216 (Bom.). It was submitted that the TPO/DRP

rejected the cost plus method adopted by the assessee and TNMM was adopted . Our attention was drawn to page no. 223 to 225 of the paper book to reflect that for the assessment year 2012-13 in the case of assessee , no adjustments were made by TPO to compute ALP of international transactions entered into by the assessee with its AE. The said order is placed at page no. 223 to 225 of the paper book. The Ld. DR on the other hand drew our attention to page no. 50 of the paper book wherein FAR analyses of the assessee is placed. It was submitted that the assessee is deemed manufacturer and it is only doing repacking of lubricating oil from bulk lubricating oil imported from parent company. Our attention was also drawn by learned DR to page no. 54 of the paper book. It was submitted that the assessee adopted cost plus method which was in fact CUP method and internal CUP was adopted to make comparisons to compute ALP. It was also submitted that the assessee relied upon the sale price by AE to India and also sale price of AE to other countries such as Nepal, China, Bangladesh etc. . It was submitted that the internal CUP was rejected by the TPO . Our attention was drawn to page no. 70 of the paper book wherein details of the transactions of AE with its customers in different markets is presented in the form of chart(said chart is reproduced in this order also in preceding para) .Reliance were also placed on the Mumbai-tribunal decision in the case of Gharda Chemicals Ltd. v. DCIT (2010) 130 TTJ 556 (Mum) . Our attention was also drawn to the decision of Mumbai-tribunal in the case of Welspun Zucchi Textiles Ltd. v. ACIT in ITA no. 6539/Mum/2009 , vide order dated 11.01.2013, it was submitted that assessee AE is parent company which supplied to different geographical market and hence the CUP method was rejected and TNMM was applied by TPO/AO which was upheld by DRP. The Ld. DR submitted that the matter can be restored to the file of TPO for fresh search and adjudication . It was submitted that it is not clear from the order of AY 2012-13 whether CUP method was adopted by the assessee and which comparables were adopted from the order produced by the assessee.

The Ld. Counsel for the assessee on the other hand in rejoinder drew our attention to page no. 53/paper book filed with the tribunal and it was submitted that that assessee import lubricating material from parent company in bulk packing and bring the same to job workers place at Taluja,

Navi Mumbai and get it refilled in small packs ranging from 910 ML to 210 ltrs which is sold to various customers in India. Our attention was also drawn to page no. 184 of the paper book which contains the segmental results of Gulf Oil Corporation Limited and it is submitted that said segments results are part of audited balance sheet . Our attention was also drawn to page no. 220 wherein both Gulf Oil Corporation Limited and Sah Petroleum Ltd. were referred in the letter filed by the assessee before DRP-1 , Mumbai and it was submitted that no segmental results in the case of Sah Petroleum Limited are available , while in the case of Gulf Oil Corporation Limited it was contended that the same does not reveal the true picture of the said segmental results.

7. We have considered rival contentions and have perused the material available on record including cited case laws. We have observed that the assessee is engaged in business of procuring/importing lubricants in bulk from its parent company G.S.Caltex Corporation, South Korea which holds 100% shares of the assessee company and selling in India to its customers after repacking in small packs of 910 ml. to 210 ltrs . The assessee's international transactions with its AE's was referred by AO to Transfer Pricing Officer(TPO) u/s. 92CA(1) of the Act. The TPO observed that assessee is repacking in small packets of lubricating oils of 910 ml. to 210 ltrs. manufactured from the lubricating oil imported from its AE in bulk packs/flexi packs of 20,000 ltrs. which are then sold to customer in Indian market in small packs. The international transactions reported by the assessee in its TP study is as under:-

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	-Purchases		18,92,59,403/-
	-Royalty		2,10,848/-
	-Interest		3,38,439/-
	Total		18,98,09,690/-

The dispute between rival parties have arisen w.r.t. computation/ determination of arm length price(ALP) of assessee's international

transaction for import of lubricating oil from its AE during the relevant period. The assessee in its transfer pricing study adopted cost plus method for benchmarking its international transactions with its AE and its AE was adopted as tested party. The assessee compared the prices charged of lubricating oil by its AE to it with the prices charged by its AE from the companies situated in other geographical areas/countries such as Nepal, China, Ghana, etc. and the assessee came into conclusion that the price charged by its AE from the assessee for import of lubricating oil is within Arm's Length Price of international transaction entered into by the assessee for import of lubricating oil from its AE and no TP adjustments/ additions are warranted u/s. 92C . As per AO, while assessee has stated that it adopted cost plus method but in-fact the assessee adopted comparable uncontrolled prices (CUP) method , wherein it adopted internal CUP method to benchmark its international transaction with its AE for import of lubricating oil . The assessee's AE is manufacturing base oil and converting into lubricants oil and supplying the same to its subsidiaries/ associated companies worldwide. As per AO, the AE doesn't assume much risk as it manufactures and supply to its subsidiaries/associated companies across globe. The brand 'Caltex' in which the assessee and its AE dealt is a 100 years old brand . The AO adopted Transactional Net Margin method (TNMM) as in the opinion of the AO internal CUP method adopted by the assessee is not reliable keeping in view geographical differences prevailing in different countries wherein the subsidiaries/associated companies were situated to whom supplies were also made by its AE , different qualities of lubricating oil supplied by its AE in different geographies/countries as also the difference in quantity dealt in these different geographical markets rendering CUP method as unreliable . We are of the view that the authorities below have rightly adopted TNMM method due to these differences noted by the authorities below as CUP method requires high degree of comparison in the product/services, geographies and other attributes such as scale of operations, type of market etc. . The comparative chart submitted by the assessee reflecting supplies made by its AE in other geographies(countries) clearly reveals that there are product quality differential and other differences such as scale of operations as the assessee is admittedly buying in larger quantities from its AE etc , than quantities sold by its AE in other geographical(countries) areas making CUP unreliable. Thus, so far as TNMM

adopted by authorities below is concerned , we concur with the views of the authorities below as TNMM will compare the operating margins of the assessee's business with that of operating margins of companies operating in similar businesses. This is the first year of operations of the assessee company and the assessee has stated to have claimed certain expenses which were incurred for initial set-up of businesses which are not routine expenses such as setting up of the company / infrastructure/offices/depots and hiring costs of new employees etc. which the assessee claimed that it has pulled down OP/TC to a negative figure of (-)18.97% because substantial expenses were incurred towards these initial costs . The assessee requires to be given adjustments for these extra-ordinary costs incurred in the first year of operations . The onus is on the assessee to justify the exclusion of these extra-ordinary costs while computing PLI. Under these circumstances, the AO rightly adopted TNM method and finally shortlisted Sah Petroleum Ltd. and Gulf Oil Corporation Limited. The assessee has not come forward with its list of comparables as it adopted cost plus method as detailed above and adopted its AE as tested parties and comparative prices charged by its AE in different geographical areas were considered. Both the companies selected as comparable by authorities below are engaged in the business of lubricating oil . Both these comparable companies are old and well established companies dealing in established brands. The assessee is also dealing in established Brand 'Caltex' which is more than 100 years old. We have observed that Sah Petroleum Limited is engaged majorly and primarily in business of lubricating oil. The assessee has contended that segment results of Sah Petroleum Limited are not available in the audited financial statements which are placed in paper book. We reject this contention of the assessee because Sah Petroleum Limited is majorly and primarily in Lubricating oils business, thus, there is no need to have separate segment results of the said company to be considered for computing ALP and for TP adjustments. So far as Gulf Oil Corporation Limited is concerned , it is in business of lubricating oils and explosives. The explosive business of said Gulf Oil Corporation Limited was divested into separate company w.e.f. 01-10-2010 . Segments results are available for Gulf Oil Corporation Limited from the audited financial statements as are available on record which are placed in filed. The authorities below are directed to adopt PLI being OP/TC of the lubricating business of Gulf Oil

Corporation Limited based on segment results of Gulf Oil Corporation Limited. The claim of the assessee that no TP adjustment has been made in the next year and hence no adjustment can be made in this year lacks merit as firstly complete details are not filed by the assessee as to the comparable short listed , TP study report of that year etc to substantiate its contention and secondly principles of res-judicata are not applicable to income-tax proceedings. Under these circumstances and factual matrix of the case , the matter need to be set aside and restored to the file of the AO/TPO for re-adjudication by re-computing ALP for benchmarking international transactions of the assessee for import of lubricating oils from its AE on merits in accordance with law in accordance with our directions as outlined in this order. The assessee is directed to provide cogent evidences/material to support its contentions. The assessee at the same time is also given liberty to file its list of comparables as the same were not filed by the assessee earlier as it was stated to be following cost plus method . The necessary evidences filed by the assessee in its defence shall be admitted by the AO which shall be adjudicated on merits in accordance with law . Needless to say that the AO shall provide proper and adequate opportunity of being heard to the assessee in accordance with principles of natural justice. We order accordingly.

8. The appeal of the assessee is allowed for statistical purposes as indicated above.

Order pronounced in the open court on 01.06.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 01.06.2018 को की गई ।

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 01.06.2018

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

**DY/ASSTT. REGISTRAR
ITAT, MUMBAI**