आयकर अपीलीय अधिकरण "बी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, PUNE

BEFORE SHRI R.S. SYAL, VICE PRESIDENT
AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं./ ITA No. 2572/PUN/2016
निर्धारण वर्ष / Assessment Year : 2011-12

Fresenius Kabi India Private Limited.
5th Floor, A Wing, Ashoka Plaza,
Pune- Nagar Road, S. No.32/2,
Vadgaon Sheri, Vimannagar
Pune-411 014
PAN : AAACF2614E

.....अपीलार्थी / Appellant

बनाम / V/s.

The Assistant Commissioner of Income Tax,
Circle-1(2), Pune.

.....प्रत्यर्थी / Respondent

आयकर अपील सं./ ITA No. 2573/PUN/2016
निर्धारण वर्ष / Assessment Year : 2011-12

The Deputy Commissioner of Income Tax,
Circle-1(2), Pune.

.....अपीलार्थी / Appellant

बनाम / V/s.

Fresenius Kabi India Private Limited.
6-E, Heritage House,
Ramabai Ambedkar Road,
Pune-411 001
PAN : AAACF2614E

.....प्रत्यर्थी / Respondent

Assessee by : Shri Ketan Ved
Revenue by : Smt. Nandita Kanchan (CIT)

सुनवाई की तारीख / Date of Hearing : 31.10.2018
घोषणा की तारीख / Date of Pronouncement : 02.11.2018

आदेश / ORDER

PER R.S. SYAL, VP :

These two cross appeals, viz., one by the assessee and the other by the Revenue are directed against the order passed by Ld. CIT (Appeals)-13, Pune on 12.08.2016 in relation to the assessment year 2011-12.

2. The assessee is, firstly, aggrieved by the application of the Transactional Net Margin Method (TNMM) in respect of its international transaction of trading activity as against its selection of Resale Price Method (RPM) as the most appropriate method.

3. Brief facts of the case are that the assessee is a 100% Indian subsidiary of Fresenius Kabi AG Germany. It is engaged in the field of Infusion Therapy and Clinical Nutrition. It is also active in the field of Transfusion Technology, supplying Blood processing systems as well as Blood bags and filters. The assessee filed its Audit report in Form no. 3CEB declaring eight international transactions. The Assessing Officer (AO) referred the matter to Transfer Pricing Officer (TPO) for determining the Arm's Length Price (ALP) of the international transactions. The assessee applied the TNMM in respect of three international transactions; Comparable uncontrolled Price (CUP) method in respect of one international transaction; and the RPM in respect of one international transaction, as the most appropriate methods for demonstrating them to be at ALP. There is no dispute on the determination of the ALP of any of the international transactions except the transaction reported at Sr. No. 2, that is, `Import of Finished goods' with transacted value of Rs.58,12,31,464/-

. The assessee applied the RPM to demonstrate that this international transaction was at ALP. The TPO observed that the assessee under this transaction was engaged in the `Distribution activity'. The assessee imported finished goods under this transaction from its Associated enterprises (AEs) and resold the same to non-AEs without any value addition. The TPO rejected the assessee's contention for the application of the RPM as most appropriate method and resorted to the TNMM for benchmarking the international transaction. As against the assessee's list of certain comparables, the TPO finally selected nine companies as comparable by making certain inclusions /exclusions in/from the assessee's list. He worked out average Profit Level Indicator (PLI) of such finally selected comparable companies at 6.97% and proposed the amount of transfer pricing adjustment at Rs.12,28,68,248/-. The Assessing Officer passed the final assessment order giving effect to the recommendation of the TPO. The assessee approached the ld. CIT(Appeals), *inter alia,* on the selection of the TNMM as most appropriate method. The ld. first appellate authority approved the view of the authorities below by relying on the order passed by his predecessor in the case of the assessee itself for the immediately preceding assessment year. The assessee is aggrieved by the application of the TNMM as most appropriate method.

4. We have heard rival submissions and perused the relevant material on record. It is seen that ld. CIT(Appeals) relied on the order passed by his predecessor for a preceding assessment year for applying the TNMM as most appropriate method in relation to international transaction of distribution activities depicted by the assessee as `Import of finished goods'. Such order of the ld. CIT(Appeals) came up for consideration before the Pune bench of the Tribunal. We have gone through the said order of the Tribunal dated 22.09.2007 in relation to the assessment years 2009-10, 2010-11, a copy of

which is placed in the paper book. The Tribunal has approved the application of the RPM as most appropriate method. In doing so, it also relied on the order passed by it for the assessment year 2008-09. The Ld. DR failed to point out any distinguishing feature in the international transaction under dispute for the year under consideration *vis-à-vis* the preceding years. Respectfully following the precedents, we hold the RPM to be the most appropriate method in respect of distribution activities undertaken by the assessee under the international transaction of `Import of finished goods'. Accordingly, the impugned order is overturned to this extent.

5. Next ground taken by assessee in its appeal is against not granting functional adjustment relating to foreign exchange (forex) loss. The assessee treated forex loss of the comparables as non-operational and computed their PLI accordingly. The TPO while determining the ALP of the international transaction did not concur with the assessee that the foreign exchange loss should be taken as an item of non-operating nature. The ld. CIT(A) approved the TPO's stand that such foreign exchange loss should be taken as operating in nature, against which the assessee has come up before the Tribunal.

6. We have heard the rival submissions and gone through the relevant material on record. The Special Bench of the Tribunal in *ACIT Vs Prakash I. Shah (2008) 115 ITD 167 (Mum)(SB)* has held that the gain due to fluctuations in the foreign exchange rate emanating from export is its integral part and cannot be differentiated from the export proceeds simply on the ground that the foreign currency rate has increased subsequent to sale but prior to realization. It went on to add that when goods are exported and invoice is raised in a currency of the country where such goods are sold and subsequently when the amount is realized in that foreign currency and then

converted into Indian rupees, the entire amount is relatable to the exports. In fact, it is only the translation of invoice value from the foreign currency to the Indian rupees. The Special bench held that the exchange rate gain or loss cannot have a different character from the transaction to which it pertains. The Bench found fallacy in the submission made on behalf of the Revenue that the exchange rate difference should be detached from the exports and be considered as an independent transaction. Eventually, the Special Bench held that such exchange rate fluctuation gain/loss arising from exports cannot be viewed differently from the sale proceeds.

7. In the context of transfer pricing, the Bangalore Bench of the Tribunal in *SAP Labs India Pvt. Ltd. Vs ACIT (2011) 44 SOT 156 (Bangalore)* has held that foreign exchange fluctuation gain is part of operating profit of the company and should be included in the operating revenue. Similar view has been taken in *Trilogy E Business Software India (P) Ltd. Vs DCIT (2011) 47 SOT 45 (URO) (Bangalore)*. The Mumbai Bench of the Tribunal in *S. Narendra Vs Addtl. CIT (2013) 32 taxman.com 196* has also laid down to this extent.

8. It is pertinent to mention that the later amendment to Safe Harbour rules provides for taking foreign exchange gain or loss as non-operating. However it is relevant to note that such rules are not applicable to the assessment year under consideration. The Hon'ble Delhi High Court in *Pr. CIT VS. Cashedge India Pvt. Ltd.*, vide its judgment dated 4.5.2016 in ITA 279/2016, has held that : `So far as the question of fluctuation of foreign exchange was concerned, the ITAT ruled that the relevant provision, i.e. `Safe Harbour Rules' had not been notified for the concerned assessment year and were, therefore, inapplicable'. Thus the Hon'ble High Court did not disturb the operating nature of forex gain/loss as held by the tribunal. In view of the foregoing discussion, we are of the considered opinion that the amount of

foreign exchange gain/loss arising out of revenue transactions is required to be considered as an item of operating revenue/cost, both for the assessee as well as the comparables. The ground taken by the assessee is, therefore, dismissed.

9. The next issue raised by assessee is against not allowing import duty adjustment. The assessee did not raise such an issue before the TPO. It was only before the ld. CIT(Appeals) that the assessee requested for granting adjustment on account of import duty paid because it incurred higher import duty in comparison with the comparable companies. The ld. CIT(A) rejected the assessee's contention by relying on the order passed by Delhi High Court in the case of *Sony India (P) Ltd. Vs. DCIT (2008) 118 TTJ (Del) 865.* Now the assessee is aggrieved by the rejection of such a claim.

10. After considering rival submissions and perusing relevant material on record, we find that the contention of the assessee for allowing separate adjustment in respect of higher payment of import duty is not tenable.

11. There can be no dispute on the principle that calculation of 'Gross profit' as envisaged under Rule 10B(1)(b) embraces cumulative effect of all the items of income and expenses leading to the determination of the amount of gross profit. Ordinarily, there can be no question of considering each item of such expenses or revenue in isolation *de hors* the other corresponding expenses or items of revenue to claim adjustment on the ground of any particular item of expenditure or income of the assessee on the higher side seen individually or as a percentage of other operating expense/incomes in comparison with its comparables. The reason is obvious that when we consider the gross profit margin, the effect of all the individual higher or lower items of expenses or incomes gets subsumed in the overall gross profit margin, ruling out the need

for any separate adjustment on comparison of one by one items resulting into the determination of the gross profit margin under the RPM or the operating profit under the TNMM. A company may have taken a building on rent for carrying on its business, in which case, it will pay rent which will find its place in the operating costs. For the purposes of making comparison, one cannot contend that the payment of rent by one enterprise in comparison with a non-payment of rent by another should be neutralized by giving proper adjustment from the operating profit of the comparable. The manifest reason is that the other enterprise may have its own office premises and in that case, the amount of depreciation on such premises will also form part of its operating costs. When we consider the operating profit of the first enterprise which is paying rent and then compare it with the second enterprise which is not paying any rent but is claiming depreciation on its own premises, the overall effect of rent in one case gets counterbalanced with depreciation on premises of the other. Similar is the position of a company having purchased new assets charging higher amount of depreciation allowance in its books of accounts *vis-a-vis* another comparable company using old assets with lower amount of depreciation. No adjustment on account of difference in the amount of depreciation of two companies is called for when the operating profits are determined because in the case of a company having purchased new asset, there will be lower repair cost and *vice versa*. The effect of all the individual items of direct or operating expenses and incomes culminates into the overall gross or operating profit margin. That is why, the legislature has provided for comparing the ratio of 'operating profit margin' to a similar base of the assessee with that of its comparables under the TNMM, thereby dispensing with the need for making any adjustment on account of higher or lower amount of individual items of expenses and incomes. Similar view has been taken by the Delhi Bench of the Tribunal in *Honda Motorcycle &*

Scooters India Pvt. Ltd. VS. ACIT in ITA No. 1379/Del/2011 vide its order passed in the year 2015.

12. Reverting to the facts of the case, it is noticed that the assessee has made out a case that it paid import duty in respect of 100% of its goods purchased, whereas, the comparables incurred import duty only @ 2% of their purchases. In our considered opinion the fact whether the import duty has been paid or not or paid to lower extent by the comparables cannot have any effect over computation of gross profit margin of the comparables. If the assessee has made costly purchases, it will naturally earn more revenue from the sales as well. One can compare apple with apple and not with orange. If purchase of goods is of higher quality and costly, it is but natural that the sale will also be correspondingly at a higher price. It is impermissible to claim that the amount of higher import duty paid by the assessee should be adjusted in isolation without having effect on the higher sales price realized from the sale of such imported goods. Once we take figure of gross profit, it takes into account not only the higher debit side of cost of purchases but also the higher credit side of the revenue earned from sales. No adjustment on account of separate items resulting into the computation of gross profit can be permitted. In our considered opinion, the stand taken by the assessee for allowing separate adjustment in respect of higher custom duty paid by it has been rightly rejected in the first appeal.

13. Another issue raised by assessee in its appeal is against exclusion of Roselabs Limited from its list of comparables and inclusion by the TPO of Mankind Pharma Limited as a comparable company. The ld. AR submitted that TPO was not justified in making such an inclusion/exclusion. It was submitted that similar issue was raised in the preceding year and the

Tribunal was pleased to remit the question of comparability of Mankind Pharma Limited to the AO/TPO for fresh determination. It was, therefore, prayed that similar treatment may be given for the instant year as well. The ld. DR did not oppose the suggestion put forth on behalf of the assessee.

14. Having heard both the sides and also following the view taken by the Tribunal in its order for the preceding year in the case of the assessee itself, we set aside inclusion/exclusion of the two companies mentioned above and remit the matter to the file of Assessing Officer/TPO for examining their comparability or otherwise afresh after allowing a reasonable opportunity of hearing to the assessee.

15. The Revenue in its appeal is aggrieved by the exclusion of Novartis India Limited as comparable. The TPO included the same in the list of comparable, which was excluded by the ld. CIT(Appeals).

16. Both sides are agreeable that Novartis India Ltd. was subject matter of consideration by the Tribunal in the preceding year as well and the Tribunal remitted such issue back to the file of Assessing Officer/ TPO for fresh determination. Following the same view, we set aside the impugned order on this issue and direct the Assessing Officer/ TPO to consider the comparability or otherwise of this company afresh after giving opportunity of hearing to the assessee.

17. The only other ground which survives in the Revenue's appeal is against granting benefit ±5% margin to the assessee in determining the ALP.

18. It is found that the Ld. CIT(A) granted the benefit of ±5% without any standard deduction in view of the amendment to Section 92C(2A) by the

Finance Act, 2012 with retrospective effect. In view of legislative amendment carried out retrospectively, the assessee cannot claim any standard deduction. We, therefore, hold that ld. CIT(A) was justified in giving benefit of ±5% on individual basis without any standard deduction.

19. To sum up, we set aside the impugned order and remit the matter to the file of AO/TPO for a fresh determination of the ALP of the international transaction of `Import of Finished goods' in conformity with the foregoing discussion.

20. In the result, appeal of the assessee is partly allowed and that of the Revenue appeal is partly allowed for statistical purpose.

Order pronounced on 2nd day of November, 2018.

Sd/-	Sd/-
(VIKAS AWASTHY)	**(R.S.SYAL)**
न्यायिक सदस्य /JUDICIAL MEMBER	उपाध्यक्ष/ **VICE PRESIDENT**

पुणे / Pune; दिनांक / Dated : 2nd November, 2018
SB

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT (Appeals)-13, Pune.
4. The Pr. CIT-1, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "**बी**" बेंच, पुणे / DR, ITAT, "**B**" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

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आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.*