

**आयकर अपीलीय अधिकरण 'डी' न्यायपीठ चेन्नई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**'D' BENCH, CHENNAI**

**माननीय श्री महावीर सिंह, उपाध्यक्ष एवं**  
**माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।**  
**BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND**  
**HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM**

आयकर अपील सं./ ITA No.987/Chny/2015  
(निर्धारण वर्ष / Assessment Year: 2010-11)

&

आयकर अपील सं./ ITA No.935/Chny/2016  
(निर्धारण वर्ष / Assessment Year: 2011-12)

<b>Triumph International (India) Pvt. Ltd.</b> 240B, Sengundram Village, Singaperumal Koil, Kanchipuram District – 603 204.	<b>बनाम</b> / Vs.	<b>ACIT</b> Corporate Circle-3(1), Chennai.
<b>स्थायी लेखा सं./जीआइ आर सं./PAN/GIR No. AABCT-5775-D</b>		
<b>(□ पीलार्थी/Appellant)</b>	<b>:</b>	<b>(प्रत्यर्थी / Respondent)</b>

अपीलार्थी की ओरसे/ <b>Appellant by</b>	<b>:</b>	Shri S.P. Chidambaram (Advocate) -Ld. AR
प्रत्यर्थी की ओरसे/ <b>Respondent by</b>	<b>:</b>	Dr. S. Palanikumar (CIT)–Ld. DR
सुनवाई की तारीख/ <b>Date of Hearing</b>	<b>:</b>	12-10-2022
घोषणा की तारीख / <b>Date of Pronouncement</b>	<b>:</b>	18-11-2022

**आदेश / O R D E R**

**Manoj Kumar Aggarwal (Accountant Member)**

1. Aforesaid appeals by assessee for Assessment Years (AYs) 2010-11 & 2011-12 arises out of separate final assessment orders passed by Ld. Assessing Officer (AO). The facts as well as issues are stated to be substantially the same in both the years. The appeal for AY 2010-11 arises out of final assessment order dated 25.02.2015 passed u/s 143(3) r.w.s. 92CA(4) r.w.s.144C pursuant to the directions

of learned Dispute Resolution Panel, Chennai [DRP] dated 22-12-2014. The assessee carried out certain international transactions with its Associated Enterprises (AE) which were subjected to determination of Arm's Length Price (ALP) before Ld. Transfer Pricing Officer-III, Chennai (TPO) vide order dated 20-01-2014. Incorporating the proposed adjustment, draft assessment order was passed by Ld. AO on 31-03-2014 which was subjected to further objections before Ld. DRP. Subsequently, final assessment order was passed by Ld. AO pursuant to the directions of Ld. DRP which is in further appeal before us. The grounds raised by the assessee read as under: -

1. The Appellant objects to the final assessment order dated 25.02.2015 passed under section 143(3) r.w.s. 92CA(4) and r.w.s 144C of the Income-tax Act, 1961 ('the Act') by the Assistant Commissioner of Income-tax, Corporate Circle - 3 (1), Chennai ('the Assessing Officer'/ 'AO') for the aforesaid assessment year on the following among other grounds:

**TRANSFER PRICING GROUNDS**

**2. Adjustment of Rs.34,483,111 to the value of international transaction of sales made to Associated Enterprises (AE)**

2.1 The TPO's recommendation/computation in pursuance of DRP directions and the consequential final assessment order passed by the AO is erroneous in seeking to make an upward adjustment of Rs.34,483,111/- to the international transaction of income/sales made to AE.

2.2 The learned DRP/AO has erred in confirming the action of the TPO in adopting prior year (FY 2008-09) capacity utilization data of comparable companies in arriving at the capacity utilization adjustment for FY 2009-10

2.3 The learned DRP erred in confirming the order of the TPO/AO in treating certain items of expenditure as variable expenses, instead of fixed costs, such as employee cost, electricity, power, heating oil (diesel), repairs & maintenance (others), professional charges, communication and miscellaneous expenses while arriving at the adjustment for capacity utilization.

2.4 The learned DRP/AO erred in not providing appropriate adjustment for excess employee cost incurred by the Appellant vis-a-vis comparable companies considering the initial phase of operations.

2.5 The TPO erred in not providing appropriate adjustments for excess depreciation charged by the Appellant vis-a-vis comparable companies considering the initial phase of operations.

2.6 The learned DRP/AO erred in confirming the action of the TPO in conducting a fresh search without providing any cogent reasons.

2.7 The learned DRP/AO erred in confirming the inclusion of additional companies by the TPO, which are not comparable to the assessee

2.8 The learned AO/DRP erred in not providing the adjustment to the arm's length margin of comparable companies on account of differences in the functional and risk profile of the Appellant vis-a-vis comparable companies mainly in respect of marketing, advertisement and promotion expenses.

### **CORPORATE TAX GROUNDS**

#### **3. Disallowance of foreign exchange fluctuation loss on restatement of External Commercial Borrowings (ECB) obtained from parent company**

3.1 The DRP erred in confirming the order of the AO in disallowing foreign exchange fluctuation loss of Rs.5,47,14,767/- arising on restatement of ECB obtained from parent company.

3.2 The DRP/AO failed to appreciate that the Appellant had been consistently adopting the same position for books of account as well as income-tax return in respect of forex fluctuation and as such the loss is allowable.

3.3 Without prejudice to the above, if the above foreign exchange loss is held to be disallowable in the subject assessment year, then the same amount which is reversed and shown as a credit item in the immediately succeeding assessment year should also be excluded from total income.

#### **4. Disallowance of provision for bad and doubtful debts**

4.1 The AO erred in disallowing provision for bad debts amounting to Rs.37,59,821/-.

4.2 The AO erred in holding that provision for bad debts is contingent in nature without appreciating that provision is created based on actual bad debts incurred in preceding years.

4.3 The AO ought to have appreciated that it is sufficient if the debit entries were made in the P&L account towards bad debts reserve/provision and as such it is not mandatory to write off each and every individual account debtor accounts.

4.4 Without further prejudice to the above, the AO ought to have appreciated that the Appellant has been consistently claiming provision for bad debts and does not claim deduction of actual bad debts utilized from the provision.

4.5 Without prejudice to the above, if the said provision is held to be disallowable in the subject AY, a suitable direction may be issued to the AO to allow the write-off of actual bad debts in the respective AY as deduction to avoid double disallowance.

5. The Appellant craves leave to add, alter, amend, substitute, rescind, modify and/or withdraw in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.

Ground No.3 has not been pressed before us. Accordingly, two issues arise under the appeal i.e., (i) Transfer Pricing Adjustment on sales made to AEs; (ii) Disallowance of provisions for bad and doubtful debts.

2. The assessee being resident corporate assessee is wholly owned subsidiary of Triumph Universal AG, Switzerland which is ultimately held by Triumph International, Switzerland. The assessee is stated to

be engaged in manufacturing of women's foundation garments, swimwear and lingerie brand in India. The manufacturing set up in Chennai is a 100% EOU catering to the needs of group companies. The assessee primarily engaged in two segments viz. manufacturing segment and distribution segment. The manufacturing segment caters to the needs of its AEs. In distribution segment, the assessee's distribution outlets spread across 52 cities in India. Its products are available at national chain stores as well as at retail stores.

3. The Ld. AR advanced arguments supporting the case of the assessee and drew attention to various documents as placed on record. The Ld. AR submitted that this is second year of manufacturing by the assessee. The Ld. AR submitted that the assessee would be entitled for capacity utilization and Ld. AR assailed the disturbance made by Ld. TPO in the same. The Ld. AR also submitted that employee's cost, misc. costs and communication costs are to be treated as abnormal costs in the initial years or alternatively, the same may be added to fixed costs for computation of capacity utilization. The Ld. AR sought risk adjustment on the ground that it was low risk entrepreneur. The order of the Tribunal in assessee's own case for AY 2009-10, ITA No.1035/Chny/2014 dated 04.04.2019 has been placed before us. The Ld. CIT-DR controverted the arguments of Ld. AR and filed written submissions for both the years. The same have duly been considered by us while adjudicating the appeals.

4. Having heard rival submissions and after due consideration of relevant material on record, our adjudication would be as under. Ground Nos.1 and 5 are general in nature which does not require any specific adjudication on our part.

## **5. Gr. No. 2 and its sub-grounds: Transfer Pricing Adjustments**

5.1 The assessee carried out several international transactions with its AEs which were in the nature of purchase & sale of raw material, sale of finished goods, import of machinery, payment of know-how, external commercial borrowings, technical and IT support services etc. The assessee has been characterized as an undertaking having normal business risk on its transactions with its AEs. The transactions of sale and purchase of raw materials and sale of finished goods were benchmarked using Transactional Net Margin Method (TNMM). Taking Profit Level Indicator (PLI) as Operating Profit / Total Cost, the assessee computed its own margins at 22.83% after claiming adjustment of capacity utilization. The fresh result, using certain filters, resulted into selection of 17 comparable entities having PLI of 11.51% as against assessee's margin of 22.83%. The three comparable out of 7 comparable entities selected by the assessee were excluded whereas 13 new comparable entities were added. The assessee's objection against selection / rejection of comparable entities was met by Ld. TPO in its order. Finally, Ld. TPO selected 14 entities having PLI of 8.58%.

5.2 Though the assessee's PLI as per financial data was (-) 17.80% but the assessee claimed capacity utilization adjustment for Rs.1265.15 Lacs and excluded the same from operating cost which turned the assessee's PLI to 22.83% which was not accepted by Ld. TPO.

5.3 While computing adjustment, the assessee considered amount of Rs.1724.28 Lacs as fixed cost which was to be eliminated out of total fixed cost for manufacturing amounting to Rs.2051.14 Lacs. The

assessee's capacity utilization was 17.02% as against 63.92% capacity utilization of 7 comparable entities chosen by the assessee. Accordingly, the assessee computed revised adjusted fixed cost of Rs.459.12 lacs and sought capacity utilization of Rs.1265.15 Lacs. However, rejecting the assessee's working of fixed cost and relying upon DRP order for AY 2009-10, Ld. TPO held that only few of the fixed costs were to be considered as fixed costs which include depreciation, rent, insurance, repairs and auditor's fees whereas all the other expenses were to be considered as variable in nature. Further, adequate data for capacity utilization of comparable entities was not available and therefore, the capacity utilization was taken at the same level as it was adopted for last AY 2009-10 i.e., 56.41%. The assessee's capacity utilization as revised to 19.52% since the assessee purchased goods from its Associated enterprises. The working reduced the capacity utilization to Rs.290.14 Lacs as against Rs.1265.15 Lacs as claimed by the assessee which gave assessee's PLI as -11.06%. Finally, Ld. TPO proposed an adjustment of Rs.1084.75 Lacs against these transactions. However, the adjustment has been rectified u/s 154 vide order dated 10.02.2014 to correct the computations and accordingly, the adjustment was reduced to Rs.693.93 Lacs.

5.4 Before Ld. DRP, the assessee assailed the action of Ld. TPO in adopting prior year capacity utilization data for comparable entities to arrive at capacity utilization. The same was rejected by Ld. DRP on the ground that current year's data was not available and therefore, the action of Ld. TPO was correct. The Id. DRP directed Ld. TPO to consider segmental results of two comparable entities. Certain other

directions were given with respect to comparable entities. The assessee sought working capital adjustments which were granted by Ld. DRP. The assessee also sought adjustment towards excess employee costs. The assessee submitted that average employee cost of comparable as percentage of net sales was 15.6% as against 30.05% for the assessee. This plea was rejected by Ld. DRP. The adjustment of AMP expenses as sought by the assessee was also rejected. The directions of Ld. DRP reduced the adjustment to Rs.344.83 Lacs which were incorporated in final assessment order by learned Assessing Officer. Aggrieved, the assessee is in further appeal before us.

### **Our findings and Adjudication**

6. We find that the assessee's capacity utilization is much less than the capacity utilized by comparable entities and therefore, the assessee seeks exclusion of certain fixed costs while computing capacity utilization which would ultimately affect its own PLI. The Tribunal in its order for AY 2009-10 (para 5.1) has observed that abnormal costs are required to be adjusted so as to have a meaningful comparability analysis and accordingly, the issue of adjustment was restored back to the file of Ld. TPO. Similar is the plea of Ld. AR in this year. We are of the considered opinion it is undisputed fact that the assessee is entitled for capacity utilization since its capacity is much lower than the comparable entities. The lower authorities have also granted the same which controvert the argument of Ld. CIT-DR that such an adjustment should not be granted. The only dispute is with respect to extent of adjustment. So far as the assessee's own capacity utilization is concerned, we direct Ld. TPO not to treat the units

purchased as its capacity utilization since it could not be said that the assessee has utilized the capacity to that extent.

7. So far as the argument of acceptance / rejection of comparable entities is concerned, we find that the assessee has been characterized as normal risk bearing entrepreneur and TP adjustment has been made proceeding on that basis. Therefore, in the absence of any cogent material warranting disturbance of comparable entities matrix, we decline to accept any of the plea of Ld. AR in this regard. The comparable entities as finally selected by Ld. TPO would require no interference on our part. Since the assessee is characterized as normal risk bearing entrepreneur the plea of grant of risk adjustment could also not be accepted. The only direction to Ld. TPO is to compute correct capacity utilization of comparable entities since prior period data may not reflect a correct picture and may not result into correct computation of capacity utilization. The assessee is directed to provide requisite to the extent it is possible. If the data is not available for this year, the average of past three years' data could be considered. So far as the issue of fixed costs is concerned, we direct Ld. TPO to adjudicate the same afresh keeping in mind the directions of Tribunal in AY 2009-10 and consequential order passed against the same. With these directions, the matter is restored back to the file of Ld. AO / Ld. TPO. The Transfer pricing grounds stand partly allowed for statistical purposes.

**8. Gr. No. 4 and its sub-grounds: Provision for bad and doubtful debts**

8.1 The assessee made claim of Rs.37.59 Lacs. The Ld. AO, held the same to be contingent in nature and such provision would be



covered u/s 36(1)(vii) which the assessee was not entitled to claim. No findings have been rendered by Ld. DRP in this regard. Aggrieved, the assessee is in further appeal before us.

8.2 We are of the considered opinion that no deduction could be granted u/s 36(1)(vii) on mere provisions. The condition to claim bad debts is that the debts should actually be written-off in the books of accounts. The provision made on gross basis without identifying the specific debtors would not entitle the assessee to claim this deduction. Since Ld. DRP has not dealt with this issue and to bring on record correct factual matrix, this issue is also restored back to the file of Ld. AO for fresh adjudication with a direction to the assessee to substantiate its stand. The grounds stand allowed for statistical purposes.

9. No other ground has been urged before us. The appeal stands partly allowed for statistical purposes.

### **Assessment Year 2011-12**

10. The facts of Transfer pricing adjustment are substantially the same in this year. In this year, Ld. TPO proposed adjustment of Rs.1052.62 Lacs after recomputing capacity utilization. The assessee's PLI was computed as (-)7.93% as against mean PLI of 8.4% as reflected by comparable entities. The working capital adjustment as sought by the assessee was rejected.

11. The Ld. DRP rejected capacity utilization altogether on the ground that this was third year of operation and the assessee was no longer in start up phase. The benefit of capacity utilization was to be given to remove the disadvantage with an assessee may face in the starting phase of the business. Once this phase is over, the assessee

cannot keep on claiming this adjustment. The other grounds raised were also dismissed. The same resulted into TP adjustment of Rs.957.46 Lacs in final assessment order. Aggrieved, the assessee is in further appeal before us.

12. So far as the issue of capacity utilization is concerned, we find that this is third year of operations and the assessee's capacity has not shown much significant improvement. Therefore, to say that the startup phase was over for the assessee would not be correct. In fact, Ld. TPO was convinced with the assessee's claim and accordingly it granted the adjustment to the assessee. Therefore, we would hold that such an adjustment would be allowable to the assessee. Accordingly, for correct computation of the same, the issue is restored back to the file of Ld. TPO / Ld. AO to grant appropriate adjustment in this year on the same lines as given in AYs 2009-10 & 2010-11. Our adjudication as for AY 2010-11 in preceding paragraphs would mutatis-mutandis apply to this issue. No interference would be required in the final list of comparable entities. The working capital adjustment, as granted by Ld. DRP in AY 2010-11, would be allowed to the assessee if the assessee is able to demonstrate the same. The corresponding grounds stand partly allowed for statistical purposes.

13. Ground No. 3 is related to provision for bad debts which stand restored back to the file of Ld. AO for fresh adjudication on similar lines. In ground no.4, the assessee is aggrieved by non-grant of consequential deduction u/s 35D for amount paid to Registrar of Companies. It has been submitted that this is third year of deduction. In earlier years, 1/5<sup>th</sup> of the expenditure has been allowed to the assessee by Ld. DRP and therefore, consequential deduction would be

allowable to the assessee in this year. The Ld. AO is directed to verify the same and allow the proportionate expenditure as granted in earlier years. In ground No.5, the assessee is aggrieved by non-grant of consequential deduction with regard to restatement of forex loss for Rs.547.14 Lacs. This is stated to be consequential to AY 2010-11. The Ld. AO is directed to verify and allow the same. The assessee is directed to provide the requisite information. The appeal stands partly allowed for statistical purposes.

14. Both the appeal stands partly allowed for statistical purposes.

Order pronounced on 18<sup>th</sup> November, 2022.

**Sd/-**  
**(MAHAVIR SINGH)**  
**उपाध्यक्ष / VICE PRESIDENT**

**Sd/-**  
**(MANOJ KUMAR AGGARWAL)**  
**लेखक सदस्य / ACCOUNTANT MEMBER**

चेन्नई / Chennai; दिनांक / Dated : 18-11-2022  
EDN/-

**आदेश की प्रतिलिपि ँ ग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/Appellant 2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त (अपील)/CIT(A) 4. आयकर आयुक्त/CIT 5. विभागीय प्रतिनिधि/DR 6. गार्ड फाईल/GF