

**आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ 'D' अहमदाबाद**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**"D" BENCH, AHMEDABAD**  
**BEFORE SMT.ANNAPURNA GUPTA, ACCOUNTANT MEMBER**  
**AND**  
**SHRI SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER**

**ITA No.575/Ahd/2015**  
**Assessment Year :2010-11**

KHS Machinery P.Ltd. 53, Madhuben Nr. Madalpur Under Bridge Ahmedabad 380006.		DCIT, Cir.2(1)(2) Ahmedabad.
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<b>(Applicant)</b>		<b>(Responent)</b>
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Assessee by :	Shri Bandish Soparkar, AR and Shri Parin Shah, AR
Revenue by :	Shri Sudhendu Das, CIT-DR

सुनवाई की तारीख/Date of Hearing : 19/01/2023  
घोषणा की तारीख /Date of Pronouncement: 17/04/2023

**आदेश/O R D E R**

**PER ANNAPURNA GUPTA, ACCOUNTANT MEMBER**

Present appeal has been filed by the assessee against order passed by the ld. Dispute Resolution Panel, Ahmedabad [hereinafter referred to as "Ld.DRP under section 143(3) read with section 144C(1) of the Income Tax Act, 1961 ("the Act" for short) dated 10.12.2014 pertaining to the Asst.Year 2010-11.

2. The grounds raised in the appeal are as under:

*"1. Your appellant being aggrieved by the order passed by Learned Dispute Resolution Panel, Ahmedabad, directions dated 10.12.2014, presents this appeal on following grounds.*

*2. The Learned Dispute Resolution Panel, Ahmedabad has erred in not allowing Upward Revision of Rs.12,39,23,444/- towards purchase price of import purchase on difference of arms length price in relation to international transactions though fully explained. The addition made to be deleted.”*

3. The sole issue in the present appeal, it was common ground, related to transfer pricing adjustment of Rs.12,39,23,444/- made to the international transaction of import of machine parts in the case of the assessee. The assessee is a company incorporated in India and engaged in manufacturing of filling and packing equipments for beverage, food and non-food industries. Assessee company manufactures complete lines and machines and parts for the beverage industries and provides support from the stage of specific operational requirement of the customer, application engineering, installation and commissioning to after sales service like training, maintenance and parts. The machines manufactured by the assessee are utilized for manufacturing of PET bottles, filling up of the beverage in the bottles, putting labels, packing products, pouching beverages etc. The details of transfer pricing adjustment made to the international transactions of the assessee by the TPO and objection of the assessee to which was dismissed by the DRP are as under:

<i>International transactions</i>	<i>Import of Associate Enterprises, KHS Germany (Import of machine parts and spares.</i>
<i>Method applied for determining Arm's Length Price (ALP) by the assessee and accepted by the Revenue</i>	<i>Transactional Net Margin Method (TNMM)</i>
<i>Adjustment made</i>	<i>Rs.12,39,23,444/-</i>

4. The ld.counsel for the assessee drew our attention to the calculation of the adjustment made on account of determination of the Arms Length Price (ALP) of the impugned transaction, at page no.5 of the assessment order as under:

<i>Operating Sales (A)</i>	<i>Rs.156,07,47,790/-</i>
<i>Arms Length Mean Profit Margin (B)</i>	<i>9.74% of the Operating Sales</i>
<i>Arms Length Price ALP) @ 90.26% of operating sales (C)</i>	<i>Rs.140,87,30,955/-</i>
<i>Total Price paid as per books of accounts (D)</i>	<i>1,53,26,54,399/-</i>
<b><i>Shortfall being adjustment u/s.92CA (G=D-C)</i></b>	<b><i>Rs.12,39,23,444/-</i></b>
<i>Value of international transaction</i>	<i>Rs.38,26,44,483.2</i>
<i>5% of the ALP determined by assessee</i>	<i>Rs.1,91,32,224.16</i>

5. He, thereafter, stated that his challenge to the impugned adjustment made to the international transaction was on the following grounds:

- i) Quantum of operating sales of the assessee taken in the above table at Rs.156,07,47,790/- was incorrect, and the correct figure of operating revenue was Rs.160,79,18,331/-;
- ii) Comparables finally taken for determining the Arms Length mean Profit margin / Profit Level Indicator (PLI), needed adjustment on account of certain comparables having been included therein, which need to

be excluded, while certain comparables rejected by the TPO needed inclusion therein;

- iii) That adjustment made by the Department by applying PLI of the comparables at the entity level was incorrect and it should have been applied at the transaction alone of the assessee with the AE of imports.

6. The ld.counsel for the assessee contended that if his arguments of the operating sales needing upward correction and the application of the PLI at transaction level, is found correct, the resultant TP adjustment would fall within the acceptable safe harbor margin of  $\pm 5\%$  of the international transactions warranting no adjustment to be made in the case of the assessee. He submitted a working in this regard as under:

<i>Particulars</i>	<i>Amount (Rs.)</i>	
<i>Revenue (A)</i>	160,79,18,331	<i>Correct Figure as per Assessee and argued by AR</i>
<i>Arm's Length Mean Profit Margin (B)</i>	9.74%	<i>Arrived by AO in order dated 27.02.2015</i>
<i>Arm's Length Price (ALP) Cost (@90.26% of A) (C)</i>	145,03,07,026	
<i>Actual Cost (D)</i>	149,27,73,277	<i>Correct Figure as per Assessee and argued by AR</i>
<i>TP Adjustment before proportionate adjustment (E= D-C)</i>	4,14,66,191	
<i>Proportionate Adjustment</i>		
<i>Total Cost Side (Debit) AE Transactions (F)</i>	36,62,23,484	
<i>Total Cost Side (Debit) AE + Non AE Transactions (same as D)</i>	149,27,73,277	<i>Correct Figure as per Assessee and argued by AR</i>
<i>Ratio (G= F/D)</i>	24.533%	
<i>Proportionate Adjustment (H= ExG)</i>	1,01,72,900	

Within +/-5% Range?		
Total Cost Side (Debit) AE Transactions (F)	36,62,23,484	
5% of international Transactions	1,83,11,174	
Proportionate Adjustment	1,01,72,900	
Whether within Range?	YES	

Therefore, we shall proceed to deal first with these arguments made by the assessee.

7. With regard to the figure of operating revenue to be taken at Rs.160.79 crores as against Rs.156.07 crores taken by the Department, the ld.counsel for the assessee pointed out that while calculating the Revenue at Rs.156.07 crores, the Department had failed to take into consideration the amounts of insurance claim receipt and foreign exchange fluctuation gain of Rs.31,61,578/- and Rs.4,40,008,963/-respectively. He drew our attention to the calculation of figure of Rs.156.07 crores of operating revenue contained at para 8.1 of TPO's order as under:

Description	Amount (Rs.)	Amount (Rs.)
Net Sales	1719070534	
Less: Trading sales	159009000	
Add: Misc Income	686256	
<b>Operating Revenues</b>		<b>1560747790</b>
Total expenses as per P/L account	1646302329	
Less: Consumption of traded goods	94759161	
Less: Donation	1904650	
Less: royalty	11257715	
Less: Interest	4639942	
Less: Provision for doubtful debts	1000000	
Less: loss on sale of assets	86462	
<b>Operating Expenses (TC)</b>		<b>1532654399</b>
<b>Operating Profit (OP)</b>		<b>28093391</b>
<b>OP / Sales</b>		<b>1.80%</b>

8. The calculation of operating revenue of Rs.160.79 crores submitted by the assessee to the DRP reproduced at page no.20 at para 2.11 of the DRP order as under:

2.11 On the basis of aforesaid, we submit that, the Ld.TPO in its computation has understated operating profit earned by assessee from its manufacturing segment. After considering the aforesaid operating expenditure and operating income the PLI of the assessee works out to be 7.16%. The detailed computation of the corrected PLI of the assessee is given in table below:

Table showing corrected PLI of the assessee

Description	Amount (Rs.)	Amount (Rs.)
Net Sales	1,719,070,534	
Less : Trading Sales	159,009,000	
Add : Misc. Income	686,256	
Add: Insurance Claim received	3,161,578	
Add: Foreign Exchange Fluctuation Gain	44,008,963	

Operating Revenues		1,607,918,331
Total expenses as per P/L account	1,646,302,329	
Less : Consumption of traded goods	95,209,161	
Less : Donation	1,904,650	
Less : Royalty	11,257,715	
Less : Interest	4,639,942	
Less : Provision for doubtful debts	1,000,000	
Less : Loss on sale of FA	86,462	
Less : Trading Expenses	39,431,122	
Operating Expenses (TC)		1,492,773,277
Operating Profit (OP)		115,145,054
OP / Sales		7.16%

12 We thus submit that if all the adjustments are taken into account, the corrected PLI of the assessee works out to be 7.16%.

9. He thereafter drew our attention to the submissions made before the DRP as to insurance claim being in relation to the damage of raw-material and foreign exchange being on account of purchase of raw-material and sale of finished goods, were part of the operating income of the assessee, and thereafter, needed to be included for calculating the operating revenue of the assessee as given at para 2.9 and 2.4 of the DRP order as under:

*“2.9 During the year assessee has received an amount of Rs.3,161,578/- on account of Insurance claim for the damage of raw material worth Rs.5,005,575/- which has been considered as operating expenditure during the same financial year. Thus, such an income on account of insurance claim shall be considered as operating income; however, Ld.TPO/AO without giving any opportunity treated the same as non-operating income. The detailed ledger of Insurance claim was submitted before Ld. AO vide*



of operating revenue by including therein the amount of insurance claim received by the assessee and foreign fluctuation gains. He also pointed out that both relates to raw-material consumed by the assessee in the operation of its business of manufacturing heavy machines. The Revenue has been unable to controvert this factual contention of the assessee.

12. In view of the same, we agree with the ld.counsel for the assessee that both the amounts of insurance claim and foreign exchange fluctuation need to be added to the operating revenue of the assessee for the purpose of arriving at the ALP of the international transaction. Thus, this contention of the assessee is accordingly allowed.

13. The next contention of the assessee in relation to the transfer pricing adjustment made pertains to the adjustment of the PLI of comparables which as per the Ld.Counsel for the assessee ought to have been arrived at by making the same at the transaction level and not at the entity level, as done by the Revenue. In this regard, he has pointed out that there are consistent decisions of Hon'ble High Courts and ITAT to this effect. The ld.counsel for the assessee drew our attention to the calculation of ALP of the international transactions reproduced above in earlier part of our order, which is being reproduced again for clarity as under:

<i>Operating Sales (A)</i>	<i>Rs.156,07,47,790/-</i>
<i>Arms Length Mean Profit Margin (B)</i>	<i>9.74% of the Operating Sales</i>
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14. He pointed out that the adjustment to be made to the international transactions on purchase of spares and parts, was calculated by first applying ALP of comparables of 9.74% to the operating sales of the assessee, thus, arriving at the ALP of the operating cost. This was compared with the actual cost of the assessee and the excess operating cost at the entity level was thus arrived at, and this figure was proposed to be adjusted to the value of the international transaction of the assessee. He pointed out from the table that by applying 9.74% PLI of comparables to the operating revenue of the assessee of Rs.156.07 crores, the ALP of the operating cost of the assessee was arrived at Rs.140.87 crores, while the actual operating cost incurred by the assessee was Rs.153.26 crores. The difference of two of Rs.12.39 crores was adjusted to the international transaction for purchase of spares and parts of Rs.38.26 crores. He stated, therefore, that clearly for arriving at the ALP of the international transaction entity level adjustment had been made. He contended that this adjustment ought to have been made at the transaction level.

The case laws in support of its contentions that the adjustment ought to have been made at the transaction level are -

- i) *CIT v. Tara Jewels Exports (P.) Ltd., [2016] 381 ITR 404/[2017] 80 taxmann.com 117 (Bom)*
- ii) *CIT v. Firestone International (P.) Ltd., [2015] 60 taxmann.com 235/234 Taxman 141/378 ITR 558 (Bom)*

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- iii) *Thyssen Krupp Industries India P.Ltd. Vs. ACIT, (2012) 27 taxmann.com 334 (2013) 55 SOT 497 (Mum-Trib) as approved by Bombay High Court in revenue's appeal CIT Vs. Thyssen Krupp Industries India P.Ltd., (2016) 70 taxmann.com 329/381 ITR 413 (Bom)*
- iv) *Hindustan Unilever Ltd. Vs. ACIT, (2018) 28 taxmann.com 142/2013) 57 SOT 1 (URO) (Mum.) as approved by Bombay High Court in revenue's appeal CIT Vs. Hindustan Unilever Ltd., (2016) 172 taxmann.com 325/394 ITR 73 (Bom)*

The ld.DR was unable to controvert the legal proposition as above.

15. Considering the same, we in agreement with the ld.counsel for the assessee that adjustment of the PLI of comparables ought to have been made at the transaction level and not entity level.

The ld.AO is directed to verify the computation now submitted by the assessee making adjustment at the transaction level, and if the adjustment was arrived at falls within  $\pm 5\%$  point of the international transaction, no adjustment has to be made to the international transaction of the assessee.

16. Since the above two arguments have been found in favour of the assessee, we do not find it necessary to deal with the issue of comparable selected for the purpose of arriving at the PLI of the ALP.

17. In the result, the appeal of the assessee is allowed in the above terms.

**Order pronounced in the Court on 17<sup>th</sup> April, 2023 at Ahmedabad.**

**Sd/-  
(SIDDHARTHA NAUTIYAL)  
JUDICIAL MEMBER**

**Sd/-  
(ANNAPURNA GUPTA)  
ACCOUNTANT MEMBER**

Ahmedabad, dated 17/04/2023