

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**INCOME TAX APPEAL NO. 1131 OF 2015
WITH
INCOME TAX APPEAL NO. 1102 OF 2015
WITH
INCOME TAX APPEAL NO. 1100 OF 2015**

The Principal Commissioner of Income Tax-5
Pune

.. Appellant

v/s.

M/s. Amphenol Interconnect India P. Ltd.

.. Respondent

Mr. Suresh Kumar for the appellant
Mr. R. Murlidhar a/w Mr. Atul Jasani for the respondent

**CORAM : M.S. SANKLECHA &
SANDEEP K. SHINDE, J.J.**

DATED : 7th MARCH, 2018.

P.C.

1. These Appeals under Section 260-A of the Income Tax Act, 1961 (the Act) challenge the common impugned order dated 30th May, 2015 passed by the Income Tax Appellate Tribunal (the Tribunal) for Assessment Years 2006-07, 2007-08 and 2008-09. Hence, these three appeals.

2. The Revenue urges only the following common re-framed questions of law for our consideration :-

(i) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in considering TNMM and MAM, without considering the FAR analysis of the transactions to determine the ALP of the export sales to AEs.?

(ii) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in differentiating CUP analysis on the basis of geographic difference and volume difference in respect of sale commission, especially when the commission is earned on the basis of percentage of sales?

3. The impugned order of the Tribunal allowed the respondent assessee's appeal from the orders of the Assessing Officer under Section 143(3) r/w 144C of the Act i.e. in terms of the directions of the Dispute Resolution Panel (DRP). It upheld that the Transactional Net Margin Method (TNM method) for determining the Arm's Length Price (ALP) in respect of the transactions (sales of goods and sales commission) with Associated Enterprises (AEs) is the Most Appropriate Method (MAM) to determine the ALP. The impugned order of the Tribunal negated the stand of the Assessing Officer / Transfer Pricing Officer (TPO) that the Comparable Uncontrolled Price (CUP) method as the MAM should be applied to determine the ALP of the respondent

assessee's transaction with AEs.

4. It is an agreed position between the parties that the facts and circumstances are identical for all the three assessment years. Therefore, it is stated that if we deal with the facts of A.Y. 2006-07 in the context of the proposed question, our answers to it would hold good for A.Y. 2007-08 and 2008-09 i.e. the two other appeals.

5. Regarding question no.(i) :-

(a) The respondent assessee is engaged in the business of manufacturing of electric connectors, accessories, cable assemblies and system integrations for application in various industries such as military, aerospace and telecom etc. The same are specialized and customized in nature. Therefore, are manufactured against only specific orders.

(b) For the subject assessment years, the respondent assessee had entered into international transactions with its AEs. The export of its customized products (finished goods) to its AEs is Rs.28.68 crores. The respondent applied that TNM method to determine the ALP of its exports to its AEs. The TPO accepted the TNM Method for determining the ALP of exports to the extent of Rs.27.24 crores. However, only in

respect of exports amounting of Rs.1.40 crores, the TPO was of the view that as there are similar products which have been sold by the assessee to the third parties at higher prices then to the AEs on the aforesaid export of Rs.1.40 crores. Therefore, the ALP has to be determined on application of CUP method. With the result, the TPO made an addition on the approximately 5% of the total exports i.e. Rs.1.40 crores by applying CUP method only on the basis of similarities of goods sold to AEs and third parties.

(c) In appeal, the Tribunal in the impugned order on analysis found that the finished goods were customized. It found on facts various differences between the finished goods sold to third parties and those sold to AEs. These differences as noted were in the nature of volume, geographical, timing and functional differences bearing in mind that the respondents does have to undertake any marketing function for sales to its AEs. Besides, on facts the impugned order of the Tribunal found that in some cases, the respondent had charged higher prices to its AEs than the prices at which the similar products have been sold to third parties. In the above facts, the impugned order holds that the CUP method would not be MAM in view of various adjustments, which have to be made due to the differences enumerated above for the necessary transfer pricing adjustment to arrive at the ALP of finished

goods. In the aforesaid facts, the Tribunal holds that the TNM method is the most appropriate method to determine the ALP. Besides, it also takes into account the fact that for an overwhelming majority of exports to AEs, the TPO accepted the TNM method for arriving at the ALP. Thus, there is no reason why for the balance of export of finished goods, the TNM method should not be applied. Thus, allowed the appeal.

(d) The grievance of Mr. Suresh Kumar, learned Counsel for the Revenue is that the impugned order has not done necessary Functions, Assets and Risk (FAR) analysis to do the comparison as was done by the TPO. Thus, these appeals require admission.

(e) We find the only grievance urged by the Revenue is unjustified. In fact, we find that the TPO has while stating that FAR analysis has to be carried out, does not indicate that it was carried out. On the contrary, we find that the Tribunal in the impugned order has done the necessary FAR analysis. This is so as it has compared the risk and functional differences involved in finished goods being sold to AEs as against those sold to third parties as we have enumerated above to come to the conclusion that the prices at which the finished goods sold to the third parties are not comparables to the prices at which the goods sold to the AEs *inter alia* on the FAR analysis. We note that the

finished goods are customized goods and the geographical differences, volume differences, timing differences, risk differences and functional differences, came to a conclusion that the CUP method would not be the MAM to determine the ALP. It upheld the stand of the respondent assessee that TNM method is the MAM to arrive at ALP. Thus, the view taken by the Tribunal on the facts before it, is a possible view on the application of appropriate tests. Revenue has not shown that the selection of TNM method as the MAM to determine the AL of export to AEs is perverse.

(f) In the above view, this question does not give rise to any substantial question of law. Thus, not entertained.

6. Regarding question no.(ii):-

(a) The respondent assessee paid sales commission to its AEs on sales made to clients located abroad, identified by the AEs located in Europe. The respondent adopted the TNM method for determining the ALP of commission paid to its AEs and found that commission paid to its AEs was higher than the ALP. However, the TPO did not accept the same, as according to him, the CUP method was the MAM to determine the commission paid to AEs. In that context, the TPO compared the commission paid by the respondent assessee to its domestic agents on

sales made in India with the average rate of commission paid to AEs in Europe for sales made to the clients abroad identified by the AEs. On basis of CUP method, the TPO made a transfer pricing adjustment of Rs. 62.89 lakhs for the purposes of arriving at the ALP of commission paid to AEs in Europe.

(b) In appeal, the Tribunal in the impugned order found that there are vast differences in the functions which are performed and the rate of commission paid by the respondent to the AEs as well as to the third parties. This was evidenced by the fact that the rate of commission paid varies from 1% to 7% depending upon the services rendered by the AEs in respect of the sales made. The impugned order of the Tribunal finds on facts that the functions performed by the AEs for which they paid sales commission was much wider than that performed by non AE agents. Further, the comparison of sales commission paid on sales made in India to sales commission paid to sales made abroad would in view of the geographical differences and differences in the functions performed result in the TNM method and not the CUP method as the MAM to determine the ALP of the sales commission paid to AEs. Thus, allowed the appeal.

(c) We note that the impugned order of the Tribunal has analyzed the differences between sales commission paid to its AEs for clients

identified by them and the sales commission paid to third party agents in respect of sales goods in India. On account of the differences in respect of function and geography between the AEs transaction and third party transaction, the CUP method is not the MAM method. It, therefore, held that TNM method is the most appropriate. In these circumstances, the view of the Tribunal that the TNM method is the most appropriate method is a reasonable and possible view on application of appropriate test in the present facts.

(d) In the above view, this question also does not give rise to any substantial question of law. Thus, not entertained.

7. Accordingly, all the three appeals are dismissed. No order as to costs.

(SANDEEP K. SHINDE, J.)

(M.S. SANKLECHA, J.)