

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

INCOME TAX APPEAL NO.1643 OF 2016

The Pr.Commissioner of Income Tax-4, Pune. ... Appellant

V/s.

M/s Vishay Components India Pvt. Ltd. ... Respondent

Mr.Tejeev Singh for the Appellant.

Mr.Nitesh Joshi with Ms.Jasmin Amalsadvala i/by M/s MINT &
CONFREES for the Respondent.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : FEBRUARY 18, 2019.**

P.C.:-

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 8th October, 2015 passed by the Income Tax Appellate Tribunal (the Tribunal). This Appeal relates to Assessment Year 2005-06.

2. The Revenue urges the following question of law for our consideration:

“Whether on the facts and in the circumstances of the case and in law, was the Tribunal right in

directing Transfer Pricing Officer (TPO) to use Transactional Net Margin Method (TNM Method) to determine the Arms Length Price (ALP) of the respondent's International Transactions on the ground that it is the most appropriate method as it is consistently accepted/adopted by the Revenue?"

3. The respondent is engaged in the manufacturing of resistors and capacitors. The manufacturing facility of the respondent is divided into a Domestic Tariff Area Units (DTA unit) and Export Oriented Units (EOU). In its EOU the respondent manufactured certain high end resistors which were exported to its Associated Enterprises (AE). During the year the respondent also commenced providing Information Technology Enabled Services (ITES). In its Transfer Pricing study the respondent had aggregated all its International Transactions and adopted the TNM method on the aggregated transactions by using profit level indicator (PLI) of operating margin over operating revenue at 15.29% and 8.4% in its two segments. The respondent worked out the PLI of comparables at 9.31%. However, the TPO was of the view that aggregation of all the respondent's transactions with its AE is not correct. Thus, the TPO applied the Resale Price

Method (RPM) for bench marking international transaction relating to import of finished goods for resale and Cost Plus Method (CPM) for bench marking international transactions for export of its finished goods to AE's. This resulted in transfer pricing adjustment of Rs.4.84 crores as reflected in the final Assessment Order dated 15th December, 2008.

4. Being aggrieved with the final order of Assessment dated 15th December, 2008, the respondent preferred an appeal to Commissioner of Income Tax (Appeals) (CIT(A)). However, by order dated 16th July, 2013, the CIT (A) dismissed the appeal on the above issue. Thus, upheld the view of the TPO making Transfer Pricing Adjustment not on the basis of aggregated international transaction on application of TNM method but on application of RPM method for imports and CPM method for exports.

5. Being aggrieved the respondent filed a further appeal to the Tribunal. In appeal the Tribunal in the impugned order observed the fact that the TNM method on the aggregated

international transaction has been consistently applied by the Revenue in determining the ALP of the respondent's International Transactions with its AE's. It noted that the assessment year 2006-07 to assessment year 2008-09 the TPO had adopted the TNM Method on the aggregated International Transaction as the most appropriate method for benchmarking the respondent-assessee's international transactions. In fact in paragraph No.18 the impugned order, the Tribunal observed as under:

“18. The case of the assessee before us is that in view of the above said facts and circumstances, there was no merit in deviating from the TNM Method applied by the assessee to benchmark its international transactions with its associate enterprises on aggregate basis. Undoubtedly, the doctrine of res judicata is not applicable to the tax proceedings, but at the same time, where there is no change in the facts in respect of a particular transaction and/or issue or proceedings, then it is the requirement of law that consistency should be maintained and the methodology adopted by the assessee for benchmarking its international transactions should not be disturbed. Where the Revenue from year to year has accepted the method adopted by the assessee for benchmarking its international transactions with its associate enterprises, in the absence of any reasons brought on record, there is no merit in

deviating or taking stand contrary to the stand accepted in both the preceding and succeeding years, while benchmarking the international transactions in the hands of the assessee. In the absence of TPO or CIT (A) having been able to demonstrate as to how the facts of the present year are different from the facts of other years, which were before the authorities, there is no justification for taking a different stand. The assessee has time and again explained the reasons why it had adopted the TNMM method and had also explained the difference between the exports made to the associate enterprises and non-associate enterprises and also sales made in the domestic market. The assessee has also explained the functional risks which are different for both the segments and consequently, no comparison could be made on the gross profit level, as adopted by the TPO for benchmarking international transactions of the assessee with its associated enterprises. The explanations of the assessee have been rejected by the TPO/CIT(A) without any basis, wherein similar explanation has been accepted by the TPO itself in all the other years. The conduct of the business and the products manufactured are identical in the year under consideration, when compared to the other years i.e. assessment years 2006-07, 2007-08 and 2008-09. In the entirety of the above said facts and circumstances, we are of the view that the adoption of TNMM method was the most appropriate method for benchmarking international transactions with its associate enterprises and we find no merit in the order of Assessing Officer in adopting RPM/CPM method to benchmark the

international transactions with its associate enterprises. We hold that the TNMM method should be applied on aggregate basis for benchmarking international transactions of the assessee.”

It was on the above basis that the Tribunal held that the TNM method on the aggregated international transactions is most appropriate to benchmark the respondent-assessee's international transaction with its AE's to determine its ALP.

6. Mr. Tejveer Singh, learned counsel appearing in support of the appeal submits that:

(i) It was for the respondent to establish the facts in the present case were identical/similar to the facts for the other Assessment Years, warranting the same view in this Assessment year as in the other years. Therefore, no fault on the part of the Revenue, in deciding the ALP for the subject Assessment Year on application of RPM and CPM methods and not on TNM method.

(ii) The Revenue had pointed out that the comparables are not functionally similar. Thus, warranting a different view; and

(iii) The reliance placed in the impugned order on the decision

of its co-ordinate bench in the case of **John Deere India (P) Ltd. Vs. DCIT** reported in ITA No.1476/PN/2010 decided on 20th February, 2015 has been challenged by the Revenue before this Court in Income Tax Appeal No.1372 of 2015 and the same has been admitted on 1st August, 2018. Therefore, this appeal also requires admission.

7. Mr.Joshi, learned counsel opposing the appeal supports the impugned order and submits that no interference is warranted. It is further pointed out that TPO has accepted the TNM method the most appropriate method in determining ALP of the respondent's transaction with its AE's till the assessment year 2015-16. Further, the objection before the revenue has been dealt with by the Tribunal and on examination of the record it has been found that no material difference has been shown for the assessment years 2006-07 and 2008-09 to that existing in the subject assessment year.

8. We have considered rival submissions. We note that the Revenue has been accepting the TNM method as most proper

method for benchmarking the aggregated international transactions with AE's over the period of time. The same has been accepted by the Revenue on examination of the issue. It is found that the TPO had for the other years on same facts has accepted the fact that there was no difference in two segments involved for transfer pricing. Thus, consistently accepting the TNM method as the most appropriate method to determine the ALP of the respondent's aggregated International Transaction till Assessment Year 2015-16. The Revenue has not been able to show any material difference in the subject assessment year which would justify a change in the most appropriate method (TNM method) adopted while benchmarking the international transactions. So far as the order dated 1st August, 2018 of this Court in case of **John Deere India (P) Ltd.** (supra) admitting the appeal of the Revenue is correct, we find that it has not been admitted on the question which arises in the present petition, i.e. the effect of the Revenue consistently accepting TNM Method as the most appropriate method for benchmarking international transactions with AE's in the absence of any material change of the facts or law. This is not the issue on which the appeal of the

revenue has been admitted by the Court in the case of **John Deere India (P) Ltd.** (supra). Therefore, it will have no application to the present facts. The objection to rejection of comparables taken by the Revenue before us, does not address the issue of the most appropriate method for benchmarking its international transaction. We are also unable to understand the contention on behalf of the Revenue that it is for the respondent to prove that there is no change/ difference in facts in the subject Assessment Year from the subsequent Assessment Years. Where TNM method is accepted to determine the ALP of international transaction. Infact, no change in facts has been asserted by the respondent. Therefore, it would be for the Revenue to show the difference in facts warranting a different view in this Assessment Year to that taken in the subsequent Assessment Years. We have herein above extracted paragraph 18 of the impugned order of the Tribunal and on its reading we are of the view that the same is a finding of fact based on appreciation of evidence. Thus, no interference is warranted.

9. For the above reasons, the question as proposed does not

give rise to any substantial question of law. Thus, not entertained.

10. Accordingly, appeal dismissed. No order as to costs.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)

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