

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	09.03.2021
Pronounced on	19.03.2021

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Tax Case Appeal No.458 of 2018

M/s.POS Hyundai Steel
Manufacturing Pvt. Ltd.,
F-70, SIPCOT Industrial Park,
Irungattukottai, NH-4,
Bangalore Highway,
Sriperumbudur - 602 105.Appellant

Vs

The Commissioner of Income
Tax (Appeals)- 3, Aayakar Bhawan,
Mahatma Gandhi Road, Chennai.Respondent

PRAYER: Appeal filed under Section 260A of the Income Tax Act, 1961 against the order dated 26.04.2017 in I.T.A.No.30/Mds/2017 passed by the Income Tax Appellate Tribunal, Chennai 'D' Bench for the assessment year 2003-04.

Preferred against the Order of the Commissioner of Income Tax (Appeals)-3, 121, Mahatma Gandhi Road, Chennai 600 034 dated 30/09/2016 made in ITA.No. 08/2006/07 /CIT (A)-3 preferred against the order of the income Tax Officer (OSD)), Company Circle V (2), Chennai dated 28/02/2006 made in PAN.No.AAACP6484G.

For Appellant: Mr.R.Sandeep Bagmar

For Respondent: Mr.T.Ravikumar, SSC

JUDGMENT

T.S.SIVAGNANAM, J.

This appeal, filed by the assessee under Section 260A of the Income Tax Act, 1961 (for short, the Act), is directed against the order dated 26.04.2017 in I.T.A.No.30/Mds/2017 passed by the Income Tax Appellate Tribunal, Chennai 'D' Bench ('the Tribunal' for brevity) for the assessment year 2003-04.

2. The appeal was admitted on 23.01.2019 to decide the following substantial questions of law:

"1. Whether on the facts and circumstances of the case, the revised order passed by the Assessing Officer u/s 154 is without jurisdiction and is liable to be quashed?

2. Whether on the facts and circumstances of the case, the Tribunal was right in summarily rejecting the TNMM Method adopted by the Appellant, without appreciating the limitations in applying the CUP Method?

3. Whether on the facts and circumstances of the case, the Tribunal was right in holding that the Appellant is estopped from changing the most appropriate method during the assessment proceedings/appellate proceedings without appreciating the need and merit of the new method for determination of arm's length price?

4. Whether on the facts and in the circumstances of the case, the Tribunal was right in confirming the rejection of adjustment made for quantity discount given to the Non-AE which is otherwise to be allowed in view of Rule 10B(3)?

5. Whether on the facts and circumstances of the case, the Tribunal was right in remanding the issue of trading segment to the CIT(A) when all the facts to adjudicate the issue were before it nad applicability of CUP Method is itself in question?"

3. The assessee is a Joint Venture Company promoted by three Korean Multi-Nationals, Hyundai Corporation (HC), Pohang Iron & Steel Company (POSCO) and POSCO Steel Service and Sales Company (POSTEEL) for manufacture of steel sheets and components out of cold rolled steel coils for supply predominantly to Hyundai Motor India Limited (HMIL) and other Automobile and White Goods Industries.

4. For the assessment year under consideration, i.e. AY 2003-04, the assessee filed its return of income on 28.11.2003 declaring a total income of Rs.2,74,72,658/-. The return was processed and the case was selected for scrutiny. As the aggregate value of international transaction made by the assessee exceeded Rs.5 crores, the case was referred to the

Transfer Pricing Officer (hereinafter referred to as 'TPO'). During the year, the assessee imported steel coils from Hyundai Corporation, Korea and Hyundai Hysco, Korea and adopted the Comparable Uncontrolled Price Method (CUP) as the Most Appropriate Method (MAM) to arrive at Arm's Length Price (ALP).

5. The assessee had two schemes of activities, namely the Trading Segment and Manufacturing Segment. For the transactions in the manufacturing segment, the assessee computed the ALP by taking the weighted average price of its imports and the weighted average price of the unrelated importer. The assessee made an adjustment of 5% towards volume discount as the import volume of the unrelated importer is 12 times more than the assessee's import of the same grade. In the transfer pricing study prepared and submitted before the TPO, the assessee did not provide any analysis to compute the ALP for the materials imported in the trading segment.

6. The Assessing Officer completed the assessment under Section 143(3) of the Act by order dated 28.02.2006 and made some additions and disallowances and restricted the transfer pricing adjustment to Rs.28,36,273/-. Thereafter, the TPO, vide order dated 16.03.2006, rejected the assessee's comparison by weighted average method and the claim of volume discount, and proposed an adjustment of Rs.58,07,322.24/- in the manufacturing segment. The TPO compared the steel coil grades purchased in the trading segment with the purchases made in the manufacturing segment and proposed an adjustment of Rs.2,69,34,151.10/-. By doing so, the TPO rejected the assessee's claim that there are differences in quality of steel grades purchased in the trading segment and these coils are not identical to the steel purchased in the manufacturing segment. The Assessing Officer, after considering the adjustment made by TPO, rectified the assessment order dated 28.02.2006 by exercising his powers under Section 154 of the Act read with Section 92CA(4) by order dated 30.05.2006 confirming the additions made by the TPO.

7. The assessee would state that though they did not challenge the jurisdiction of the Assessing Officer to exercise powers under Section 154, this being a jurisdictional issue, the assessee is not precluded from raising such a contention for the first time before this Court. It is submitted that the order of rectification passed under Section 154 is without jurisdiction as there was no mistake apparent from the records as on the date of which the assessment was completed under Section 143(3) by order dated 28.02.2006. It is further submitted that the subsequent order of the TPO dated 16.03.2006 will not make the order of assessment dated 28.02.2006 rectifiable under Section 154 of the Act.

8. The assessee filed appeal against the assessment order before the Commissioner of Income Tax (Appeals)-3, Chennai (hereinafter referred to as 'CIT(A)'). The assessee raised additional grounds before the CIT(A) stating that it used Transactional Net Margin Method (TNMM) as the most appropriate method for computing the ALP and provided an analysis on the same.

9. The CIT(A) called for a Remand Report from the TPO and accordingly, a report dated 10.02.2016 was submitted stating that during the TP proceedings, the assessee had adopted CUP method as the MAM in the TP documentation and resorting to TNMM is only an after thought. Further, in TP analysis, only in the absence of internal comparables, external comparables will be taken for comparability purpose using TNMM. Further, the TPO held that in the assessee's case, internal comparables are available and all other factors that would be analysed for CUP method are also satisfied and hence, CUP is the most suitable method. Further, the TPO stated that the prices of the Non-Associated Enterprises (AE) are much less than the prices of the assessee company and as the prices of Non-AE and AE are after volume discount, further allowance for volume discount was not called for.

10. After perusal of the Remand Report, the CIT(A), by order dated 30.09.2016, confirmed the transfer pricing order dated 16.03.2006 and the Remand Report dated 10.02.2016 and held that the CUP method is the most appropriate method. Further, the CIT(A) confirmed the order of the TPO and the Remand Report and held that the allowance for volume discount is not called for.

11. Aggrieved by the order of the CIT(A), the assessee filed appeal before the Tribunal. The appeal was partly allowed by order dated 26.04.2017, which is impugned in this appeal. The Tribunal held that the assessee itself adopted CUP method in its TP study, which was accepted by the TPO/Assessing Officer and cannot seek for substitution of another method as MAM as it would lead to reopening of assessment. Further, the Tribunal held that the assessee is a Joint Venture Company of Hyundai Corporation and expects more concessions than unrelated companies and the assessee neither demonstrated with bills that it did not get volume discount nor did it produce any agreement between AE and Non-AE companies for such volume discounts. Therefore, the claim of adjustment on account of volume discount was rejected. With regard to the claim of non-comparability of steel purchased in the trading segment, the Tribunal remanded the matter back to the file of the CIT(A) for adjudication.

12. Mr.R.Sandeep Bagmar, learned counsel for the appellant made his submissions on the substantial questions of

law, which have been framed for consideration.

13. With regard to substantial question of law No.1, it was submitted that the TPO does not have jurisdiction to conduct a transfer pricing adjustment once the assessment has been completed by the Assessing Officer under Section 143(3) of the Act. The Assessing Officer, in the order dated 28.02.2006, has accepted the ALP, as computed by the assessee, and exercised his jurisdiction under Section 92C(3) and completed the assessment. The TPO has no jurisdiction to parallelly exercise power under Section 92CA, after completion of the assessment by the Assessing Officer. This is so because the TPO is ceased to have jurisdiction on completion of the assessment vide order dated 28.02.2006. Further, it is submitted that the Assessing Officer, under the guise of invoking his power under Section 154 of the Act, seeks to review the assessment order dated 28.02.2006, which is impermissible as the subsequent order of the TPO cannot be a ground to invoke the provisions of Section 154 to rectify an order of assessment when there is no "mistake apparent on the record". The Assessing Officer in fact has exercised powers vested by the Commissioner under Section 263 of the Act and therefore, the order is without jurisdiction. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of T.S.Balaram, ITO Vs. Volkart Brothers and others [(1971) 82 ITR 50 (SC)].

14. The learned counsel for the appellant requested the Court to deal with substantial question of law Nos.2 and 3 together. It is submitted that it is a settled position that there is no estoppel in law and the duty of the Assessing Officer is to compute the total income in accordance with the provisions of the Act. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of Kanwar Singh Saini Vs. High Court of Delhi [(2012) 4 SCC 307. Further, it is submitted that the assessment year under consideration was the second year of implementation of Chapter X of the Act and the law was evolving as to how to determine the MAM and therefore, the tax payer is not estopped from pointing out a mistake in the assessment, though such mistake is a result of evidence adduced by the tax payer. In support of this contention, the learned counsel referred to the decision of the Delhi High Court in the case of PCIT Vs. Matrix Cellular International Services P. Ltd. [ITA.No.484 of 2017, dated 22.11.2017]. Reliance was also placed on the decision of the High Court of Punjab and Haryana in the case of CIT, Chandigarh Vs. M/s.Quark Systems India Pvt. Ltd. [ITA.No.594 of 2010, dated 16.05.2011]. It is further submitted that the determination of approximate ALP is the key factor, for which MAM has to be followed and if at any stage of the proceedings, it is found that by adopting one of the prescribed methods, other than

chosen earlier, the most appropriate ALP can be determined. It is submitted that in the assessee's case, TNMM is the MAM over CUP method. Further, the learned counsel referred to the subsequent assessment order where the assessee has adopted the TNMM as the MAM and the same was accepted by the Assessing Officer/TPO.

15. With regard to the substantial question of law No.4, the learned counsel submitted that in the CUP method, necessary adjustments are required to be made in order to arrive at the ALP. By referring to Rule 10B(1)(a)(ii), it is submitted that the price can be adjusted to account for any differences between the international transaction and in the assessee's case, on the basis of the letter issued by one of its AE, who supplied to the third party comparable, had stated that it had offered volume discount based on the quantity purchased. Further, it is submitted that under Rule 10B(3), if accurate adjustments are not made to a comparable to eliminate effects of material evidences, then such comparable ceases to be an uncontrolled transaction and consequently, no ALP can be determined on the basis of that comparable. In this regard, reliance was placed on the decision of the High Court of Bombay in the case of PCIT Vs. M/s.Merck Ltd. [ITA.No.726 of 2017, dated 16.09.2019.

16. With regard to the substantial question No.5, the learned counsel for the appellant submitted that the Tribunal ought not to have remanded the matter with regard to the issue of trading segment when all the facts to adjudicate the issue were brought before it and applicability of CUP method itself was in question. On this issue, it is submitted that for adopting CUP method, there is a requirement of high degree of comparability in products, functions performed, contractual terms, characteristics and volume of transactions, etc., and in the assessee's case, comparison of PSCEN with SPCEN-HMI is not appropriate. It is further submitted that the grades of steel imported for the trading segment are very specific in nature in order to cater to the requirements of HMI. This is because the steel used for automobile industry is different from steel used for goods and appliances. Therefore, SPCEN cannot be a comparable for SPCEN-HMI under CUP method. It is further submitted that comparison of prices of the grades of steel imported by the appellant to its manufacturing segment and trading segment is incorrect, as there is differences in specifications and quality. The assessee sought to support this stand by producing Mill Test Certificate for the imports made by them. Therefore, SPCEN and SPCEN-HMI cannot be comparables in terms of Rule 10B(3) read with Rule 10B(1)(a) and consequently, CUP method cannot be adopted. Further, it is submitted that the remand order of the Tribunal to ascertain comparables in trading segment for applying CUP method is a futile exercise as there

are no comparables available and therefore, the supplementary transfer pricing study and adopting TNMM as the MAM should be accepted.

17. On the above grounds, the learned counsel for the appellant sought for interference with the order passed by the Tribunal and answering the substantial questions in favour of the assessee.

18. Mr.T.Ravikumar, learned Senior Standing Counsel appearing for the respondent submitted that the assessee had submitted a note with reference to the information and documents required to be provided under Section 92D and 92E of the Act, wherein, they have, in no uncertain terms, stated that having regard to the nature of transaction and their activity and the product which they deal with the available data, the assessee had adopted the most appropriate method of CUP method. Further, the assessee stated that the data required for external comparables may be difficult to obtain and interpret or it may be incomplete. Therefore, they have chosen the internal comparables of comparable uncontrolled transaction price method.

19. The assessee produced a letter from Hyundai Corporation addressing to the TPO dated 10.02.2006 with regard to offering of volume discount to overseas customers. It is further submitted that the TPO issued show cause notice dated 03.03.2006 with regard to three issues, namely non-maintenance of transfer pricing documentation; SPCD and SPCEN grade steel and SPCEN-HMIT and SPCD-HMI grade steel.

20. On the first issue, the TPO stated that the assessee failed to keep, maintain and produce the TP documentation for international transactions representing purchase of 12751.31 MT of steel to initiate penalty proceedings under Section 271AA of the Act. With regard to the second issue, the TPO proposed to make adjustments to the import price of SPCD and SPCEN grade steel. On the third issue, after taking note of the reply, which was filed by the assessee, the TPO stated that as per the assessee company's claim that the materials SPCEN and SPCEN-HMI, SPCD and SPCD-HMI are not identical and hence not comparable, is not tenable as the assessee could not prove the difference in quality with documentary evidence. Further, the TPO stated that the assessee has submitted the sale invoice copies of similar transactions made in India by TISCO and claimed that the purchase price is comparatively low. The TPO proposed that this claim could not be accepted as the company has an obligation with Tamil Nadu Government to purchase 30% of their raw material requirements from local market and thus, it becomes a controlled transaction. The TPO also referred to the 'Statistics on Iron and Steel Industry in 2003' published by OECD. Thus, the TPO stated that the sale transactions of the assessee company made

with Non-Associate Enterprises with regard to material SPCEN and SPCD are taken as comparables for comparing with the sale price of SPCEN-HMI and SPCD-HMI made to AE. On doing so, difference in price totals to the tune of Rs.2,69,34,151.10 and this is to be adjusted to the purchase price of materials.

21. The assessee was called upon to submit their objections for the adjustment proposed. The assessee submitted their reply dated 13.03.2006 requesting to drop the proposal in the show cause notice dated 03.03.2006. The reply was on the merits of the matter as to how they seek to sustain their contention.

22. The TPO passed orders dated 16.03.2006 under Section 92CA(3) confirming the proposal in the show cause notice and held that CUP method is the MAM. The Assessing Officer issued show cause notice dated 28.03.2006. In the said notice, under the column "particulars of mistake proposed to be rectified", it was stated that the ALP is less than the actual import price of particular grade. Hence, there will be an addition to the total income taken for tax purposes. The assessee submitted their reply dated 29.05.2006. Thereafter, the Assessing Officer passed orders dated 30.05.2006 under Section 154 read with Section 92CA (4) of the Act.

23. The assessee challenged the order by filing an appeal before the CIT(A). The CIT(A) called for a remand report from the TPO, which was submitted on 10.02.2016, wherein the TPO stated that CUP method is the suitable method. The CIT(A) passed order dated 30.09.2016 and after referring to the remand report, observed that the assessee is resorting to approbate and reprobate and this is one of the species of estoppel. Further, the CIT(A) agreed with the Assessing Officer that CUP method is the MAM. Thus, the CIT(A) held that the TPO's order has answered the assessee's arguments and in view of the findings given by the Assessing Officer in his remand report and the speaking order passed by the TPO, the addition was confirmed and the appeal was dismissed.

24. Aggrieved by the same, the assessee went on appeal before the Tribunal and expect for the issue raising the substantial question of law No.5, all other issues were decided against the assessee and the issue arising in question No.5 was remanded to the CIT(A) for adjudication based on the request made by the assessee, for which the Revenue did not object.

25. It is submitted that the issue relating to the jurisdiction of the Assessing Officer to invoke Section 154 of the Act was never raised before the Assessing Officer or the CIT (A) or the Tribunal and such being the case, the assessee is not the person aggrieved over the same and the issue has become

final. Furthermore, the jurisdictional issue should have been raised by the assessee at the earliest point of time.

26. In support of this contention, the learned Senior Standing Counsel placed reliance on the following decisions:

- (i) K.Ravindranathan Nair Vs. CIT [(2001) 247 ITR 0178 (SC)]
- (ii) Mangalore Ganesh Beedi Works Vs. CIT [(2015) 378 ITR 0640 (SC)]
- (iii) P.R.Narahari Rao Vs. CIT [(2008) 299 ITR 0400 (Ker)]
- (iv) Ramanlal Kamdar Vs. CIT [1977) 108 ITR 0073 (Mad)]
- (v) Anjuga Chit Fund (P) Ltd. Vs. DCIT [(2009) 318 ITR 0121 (Mad)]
- (vi) Sundaram Finance Ltd. Vs. ACIT [(2018) 93 taxmann.com 250 (Mad)]
- (vii) Sundaram Finance Ltd. Vs. DCIT [(2018) 99 taxmann.com 152 (SC)].

27. Thus, it is submitted that unless the finding of the fact is challenged as perverse, the assessee is precluded from raising such a contention for the first time before this Court.

28. Further, reference was made to the scope of Section 154 of the Act and that it falls in Chapter XIV, which deals with procedure for assessment and it is submitted that this aspect has been lucidly brought out in the decision in K.Ravindranathan Nair.

29. The learned Senior Standing Counsel referred to Rules 10B(2), 10B(3), 10B(4), 10B(5), 10D(3)(e), 10D(4) and 10D(5). These rules were referred to buttress the submission regarding the data, which is to be furnished by the assessee and how it speaks of the current year's data and also speaks of the data to be made available if the current year data is not available and also mentioned about the agreements and other records and whatever documents were furnished by the assessee during the assessment proceedings was to justify CUP method as the MAM. Therefore, it is submitted that the plea of jurisdiction cannot be raised by the assessee at distance of time.

30. Further, it is submitted that the assessee cannot plead that the rule of consistency has to be adopted, since admittedly, the assessments, which have been referred to by the learned counsel are all assessments, which are subsequent to the assessment order under consideration in this appeal and in support of such contention, reliance was placed on the decisions of the Hon'ble Supreme Court in the cases of CIT Vs Oswal Agro Mills Limited [(2009) 313 ITR 24, C.K.Gangadharan and another

Vs. CIT [(2008) 304 ITR 0061], Catholic Syrian Bank Ltd. Vs. CIT [(2012) 343 ITR 0270]. Therefore, it submitted that substantial question of law No.1 may be answered against the assessee.

31. With regard to substantial question of law Nos.2 and 3, the learned Senior Standing Counsel had elaborately referred to the factual matrix as to how the TPO has assigned reasons to sustain his conclusion that CUP method is the MAM and as to how the CIT(A) confirmed the orders passed by the TPO as well as observations and findings recorded in the remand report. Therefore, it is submitted that it is not a case of change of the most appropriate method nor it would be a case of estoppel, but it is a confirmation done by the authority considering the facts and figures. Therefore, the learned counsel prayed for answering substantial question Nos.2 and 3 against the assessee.

32. With regard to substantial question of law No.4, the learned Senior Standing Counsel referred to the relevant portion of the findings recorded by the Assessing Officer, the TPO, the remand report and the order of the CIT(A) as confirmed by the Tribunal and submitted that the reasoning is fully justified, more particularly when the appropriate method was held to be the CUP method.

33. With regard to substantial question of law No.5, it is submitted that the assessee cannot seek to question the remand as the assessee is the one who sought for the matter to be remanded to the CIT(A) for adjudication and the Revenue did not make any objection for remanding the matter back to the CIT (A), which has been specifically recorded by the Tribunal in paragraph 9.0 of the impugned order.

34. On the above grounds, the learned Senior Standing Counsel appearing for the respondent sought for dismissal of the appeal.

35. We have elaborately heard Mr.R.Sandeep Bagmar, learned counsel for the appellant-assessee and Mr.T.Ravikumar, learned Senior Standing Counsel appearing for the respondent-Revenue.

36. As noticed above, the learned counsel for the appellant was fair in submitting that the question of jurisdiction of the Assessing Officer to exercise power under Section 154 of the Act was never raised at any earlier point of time and being raised for the first time in this appeal.

37. It is the submission of the learned counsel for the appellant that the said issue involves jurisdiction of the Assessing Officer to invoke power under Section 154 and no new

facts are brought before the Hon'ble Court and the same is purely a question of law to be adjudicated under Section 260(A) of the Act.

38. The following dates would be relevant before we proceed to take note of the relevant facts and law on the subject.

39. On 21.11.2005, a reference was received by the TPO under Section 92CA(1) from the Assessing Officer, wherein the Assessing Officer made the reference for determination of ALP with reference to all transactions reported in Form No.3CEB filed by the assessee. Accordingly, a notice under Section 92CA (2) was issued to the assessee on 28.11.2005 to furnish the details called for in an enclosed questionnaire. The assessee submitted the details called for in the questionnaire on 13.01.2006 and the AGM (Finance) of the assessee company attended the hearings conducted by the TPO on various dates. While the matter was in issue before the TPO and the assessee was extending full cooperation to the proceedings, the Assessing Officer passed an order under Section 143(3) of the Act on 28.02.2006. The contention of the appellant is that in the assessment order, the Assessing Officer made an adjustment of ALP and added a sum of Rs.28,36,273/- to the total income. Therefore, it is submitted that the Assessing Officer has become functus officio and cannot rectify or revise his order, after completing his assessment vide order dated 28.02.2006. The TPO, after hearing the assessee on various dates, passed an order dated 16.03.2006 under Section 92CA(3).

40. In the later part of this judgment, we shall go into the findings rendered by the TPO. The TPO directed the Assessing Officer to compute the total income of the assessee in accordance with Section Sub-Section (4) of Section 92C of the Act, after giving an opportunity to the assessee and simultaneously clarified that the findings and discussions are applicable only in respect of the reference received for the assessment year 2003-04 and not for subsequent assessment years.

41. Pursuant to such order, the Assessing Officer issued notice under Section 154 of the Act. In the notice, the Assessing Officer stated that she proposed to rectify the defect with regard to ALP, which is less than the actual import price of particular grade and hence, there will be an addition to the total income taken for tax purposes.

42. The assessee submitted their reply dated 29.05.2006 referring to their earlier reply dated 13.03.2006 filed to the show cause notice dated 30.03.2006 and the written submissions dated 20.02.2006 filed before the TPO. Further, the assessee

also referred to all other communications filed for submission of documents, offering clarification and technical explanation for the difference in quality of import material. Further, the assessee stated that the TPO had compared the transaction date, import price wherever it is higher only and ignored the transactions the import prices are lower and did not consider the volume discount offered by supplier and a 5% variation allowed by CBDT Circular dated 23.08.2001. Further, with regard to ALP for SPCEN and SPCD Trading grades, the assessee stated that the TPO had compared the import price of unidentical goods, which are not of same quality. Accordingly, the assessee prayed for dropping the total loading of Rs.2,99,05,100/- to the international transactions towards the ALP.

43. Thus, it is seen that the assessee, at no point of time, questioned the jurisdiction of the Assessing Officer to implement the directions of the TPO vide order dated 16.03.2006. The thin line of argument, which is now placed before us, is by referring to the printed notice form under Section 154, which was issued to the assessee.

44. As noticed above, the assessment order dated 28.02.2006 is an order passed under Section 143(3) of the Act and not an order passed under Section 92C(3) of the Act. This is evident from the preamble portion of the assessment order in column No.13. The assessee did not raise any contention before the TPO that either the reference made to him under Section 92CA (1) was erroneous or without jurisdiction or that the TPO has no jurisdiction to deal with the matter on account of the assessment order dated 28.02.2006 under Section 143(3) of the Act.

45. In our opinion, the assessee was conscious that they cannot raise such an objection because the order of reference was made and received by the TPO on 21.11.2005, much prior to the order passed under Section 143(3). Even thereafter, the assessee had an opportunity to question the jurisdiction of the TPO as the TPO had issued notice under Section 92CA(2), dated 28.11.2005, whereunder the assessee was directed to furnish details and a questionnaire was appended to the notice. The assessee did not raise any objection with regard to the jurisdiction but complied with the demand in the notice dated 28.11.2005 and submitted the details called for in the questionnaire on 13.01.2006.

46. The order passed by the TPO shows that the assessee had cooperated in the proceedings and their authorized representative, i.e. AGM (Finance) of the company, has attended the hearings on various dates. Therefore, it will not lie in the mouth of the assessee to now state that the entire proceedings are vitiated and that the order passed by the TPO under Section 92CA(3) of the Act would be a paper order. The TPO issued

directions to the Assessing Officer to compute the total income of the assessee in accordance with Section Sub-Section (4) of Section 92C of the Act. This is a mandate prescribed in the statute. The TPO also directed the Assessing Officer to afford an opportunity to the assessee.

47. Precisely, the Assessing Officer has complied with the directions of the TPO in its letter and spirit. The notice clearly states that the ALP being less than the actual price of a particular grade, there has to be an addition to the total income taken for tax purposes. The assessee clearly understood the implication as they were aware of the TPO's order dated 16.03.2006, which was after affording full opportunity to the assessee. Therefore, the assessee thought fit not to question the jurisdiction of the Assessing Officer in issuing a notice in a form prescribed for notice under Section 154 of the Act. The reply given by them, dated 29.05.2006, is on merits and not a whisper about the alleged jurisdiction of the Assessing Officer to issue the notice. The Assessing Officer passed the order under Section 92CA(4) of the Act and this being a mandate under the statute, the Assessing Officer had to follow. Once again, the assessee was fully aware of the implications and presumably for such reason, did not raise any objections as regards the validity of the notice dated 28.03.2006, when they filed appeal before the CIT(A) in February, 2011. In any event, what is relevant is "substance" over "form". The conduct of the assessee clearly demonstrates that they rightly understood the legal position and the present attempt of the assessee to question the jurisdiction of the Assessing Officer deserves to be rejected.

48. That apart, the grounds and additional ground of objections show that the validity of the notice dated 28.03.2006 was never called in question. The CIT(A) called for a remand report from the TPO. If, according to the Assessing Officer, the order of assessment dated 30.05.2006 passed under Section 92CA (4) is a nullity, it would have been well open to the assessee to raise such a contention before the CIT(A) and seek for setting aside the order. Rather, the assessee reconciled themselves with the direction issued by the CIT(A) to the TPO by calling for a remand report. The assessee was given an opportunity after the remand report was received and they made their submissions by way of additional submissions dated 28.09.2016. In the said additional submissions, nowhere the jurisdiction of the Assessing Officer has been questioned. The CIT(A) proceeded to decide the matter on merits and passed orders dated 30.09.2016. The assessee carried the matter on appeal to the Tribunal and once again, the assessee never raised any contention with regard to the validity of the notice dated 28.03.2006. Thus, considering this factual situation, we are of the clear view that the present attempt of the assessee is not

tenable and accordingly rejected.

49. We have elaborately set out the facts in the preceding paragraph to demonstrate that the argument before us is not on the question of jurisdiction, but it is entirely couched on facts qua the conduct of the assessee, which would clearly preclude the assessee from raising such a question alleging the same to be a substantial question of law.

50. Though the Revenue had placed reliance on the decision of the Hon'ble Supreme Court in the case of Samtel India Ltd. Vs. CIT, Delhi [(2012) 25 taxmann.com 535], the learned counsel for the appellant would submit that looking into the facts, this decision will support the assessee. However, what is required to be seen in the said decision is the ratio laid down with regard to Section 154, which falls under Chapter XIV of the Act. It is pointed out by the Revenue that Section 154 finds place in Chapter XIV which deals with Procedure for Assessment. Section 154 deals with rectification of mistake apparent from the record. Chapter XIV not only deals with assessment and re-assessment and it also deals with re-computation and the object of re-computation is to assess (quantify) the correct taxable income and such re-computation of a correct taxable income is a matter of procedure. This decision squarely explains the procedure of assessment as settled down in Chapter XIV of the Act and Section 154 falls under the said Chapter.

51. At the risk of reputation, we may point out that the assessment order dated 28.02.2006 is an order under Section 143 (3) and not an order under Section 92C(3) of the Act.

52. The argument of the assessee before us is that the Assessing Officer has exercised jurisdiction under Section 92C (3) and the TPO parallelly cannot exercise his power under Section 92CA. On facts, the assessee is wrong.

53. Reference to the TPO was as early as on 21.11.2005. The assessee submitted the details called for in the questionnaire on 13.01.2006 furnishing all relevant information and participated in the proceedings before the TPO, which culminated in an order dated 16.03.2006 under Section 92CA(3) with a direction to the Assessing Officer to compute the total income in accordance with Sub-Section 4 of Section 92 of the Act.

54. Thus, the assessee having been fully aware of the factual position, the faint attempt made before us alleging the question to be a substantial question of law is not sustainable.

55. The question pertaining to the jurisdiction of the Assessing Officer to issue notice dated 28.03.2006 is not a pure

question of law but greatly entwined into the factual thicket. Thus, the assessee, having not objected to any of the orders passed by all the hierarchy of authorities on the said ground, is wholly precluded from raising such a contention before this Court for the first time alleging the same to be a substantial question of law.

56. We draw support to this conclusion from not only the decision in Samtel India Ltd., but the decision in K.Ravindranathan Nair, wherein it was held that unless the finding of the Tribunal on facts is perverse, the question of considering the correctness of the order in an appeal under Section 260A of the Act would not arise. The decision in Mangalore Ganesh Beedi Works would also support the said conclusion, more particularly, the observations contained in paragraphs 19 and 20, wherein reference was made to the decision in K.Ravindranathan Nair. The decisions in Ramanlal Kamdar and Anjuga Chit Fund (P) Ltd. would also support our conclusion.

57. Thus, for the above reasons, substantial question of law No.1 is answered against the assessee.

58. The substantial questions of law 2 and 3 are taken up together as requested by the learned counsel for the appellant.

59. The assessee would submit that the authorities and the Tribunal was of the view that the assessee is estopped from contending that the TNMM is the MAM after having adopted the CUP method in their TP study at the first instance. There can be no quarrel about the legal position which has been laid down in Matrix Cellular International Services P. Ltd. and M/s.Quark Systems India Pvt. Ltd. (supra), wherein it has been held that use of one method in a transfer pricing report does not estoppe the assessee from later claiming that another method is the most appropriate one, provided that it is the correct position.

60. But, in the case on hand, we find that the TPO, at the first instance, did not foreclose the assessee solely on the ground of estoppel. To explain this position, we may refer to the order passed by the TPO dated 16.03.2006 under Section 92CA (3) of the Act. In paragraph 6 of the order, the TPO referred to the method adopted by the assessee, namely the CUP method, as the MAM to arrive at the ALP. The reason for adoption of CUP method and the step involved in arriving at the ALP by the assessee was clearly spelt out in the transfer pricing document. After reproducing the relevant portion of the transfer pricing document, the TPO proceeded to consider as to what would be the appropriate method. In paragraph 6.2, analysis of ALP has been done. The 6 steps and the computation of the ALP for the assessment year is given in a tabulated form. In a note below

the tabulated form, it has been stated as follows:

"Note

* The import price as determined using an uncontrolled Transactions is more than the actual import price from the Associated Company. Hence, the Arm's Length Price is the actual import price.

** A Comparable Uncontrolled transactions is not available for this imported material."

61. The TPO has observed that from the steps listed down in his order, it is clear that the assessee company has adopted weighted average method for comparison of the transactions and Rule 10A of the Income Tax Rules, 1962 clearly gives the definition of uncontrolled transaction. After referring to Rule 10A, the TPO has observed as follows:

"In Step 3 Assessee Company has made an adjustment of 5% towards volume discount. Assessee Company has claimed 5% - 10% volume discount on the prices of Non Associate Enterprise. On perusal of the "Order sheet price of POSCO" and the prices of Non Associate Enterprise, it is noted that the prices of Non AE is much less than the prices of POSCO.

Further, if the contention of the assessee company for 5% volume discount on the basis of Hyundai Corporations letter dated 10.02.2006 which reads as follows: "With regard to above, we confirm that we offer a discount on the range of 5%-10% on the steel coils exported to Indian importers viz M/s.Mahindra Intertrade Limited during the period April 2002-March 2003 based on their quantity volume. We further state that per our sales promotion practice, we had offered a 5% volume discount duly adjusted in the C & F price in USD/MT to our overseas customer M/s.Mahindra Intertrade Limited for the particular grade of steel coils based on the quantity volume purchased by the said importer during the said review period" is considered, then it can be construed that the volume discount of 5% has also been given in the prices of Associate Enterprise. Hence, as the prices of Non AE and AE is after Volume Discount further allowance for volume discount is not called for. Therefore the claim of volume discount is not allowed."

62. Next, the discussion was about the SPCEN-HMI and SPCD-HMI and the following finding has been given:

"The assessee company has submitted the invoice copies of transactions made in India, with TISCO, and claims that the purchase price SPCEN-HMI and SPCD-HMI is comparatively low. This claim cannot be accepted as the company has the obligation with the Government to purchase 30% of their requirements from local markets, which becomes a controlled transaction, and further it is not possible to compare an international transaction with a national transaction. Hence the choice of comparing the price with TISCO invoices is not considered.

Therefore, the sale transactions of a company made with Non-Associate enterprises with regard to material SPCEN and SPCD are taken as comparables to be compared with the sale price of SPCEN-HMI and SPCD-HMI made to AE. On a transaction to transaction based comparison of prices as given in Ann III for SPCEN and Ann IV of SPCD, it works out to a difference in prices to the tune of Rs.2,69,34,151.10 which is to be adjusted to the purchase price of materials.

SPCEN-HMI	Rs.21,98,232.27
SPCD-HMI	Rs.4,945,918.83
TOTAL	Rs.2,69,34,151.10"

63. Next, the TPO mentioned about the failure on the part of the assessee to keep and maintain information and document in respect of international transactions and ultimately proceeded to determine the Arm's Length Price, which is as follows:

"7. DETERMINATION OF ARMS LENGTH PRICE:

As per the provision of sub-section (1) of Section 92 of Income Tax Act, any income arising out of international transaction shall be computed having regard to Arms length price, which is determined by applying most appropriate method having regard to nature of transactions, functions performed and other relevant factors. In this case, as discussed above, I am of the opinion that the price charged or paid in the above stated international transactions have not been determined in accordance with the subsection (1) and (2) of Section 92C of

Income Tax Act. Hence, on the basis of materials available with me and after giving opportunity to the assessee, I proceed to determine the Arms length price in relation to the above said international transactions in accordance with subsection (1) and (2) of Section 92C, as under:

FOR IMPORT OF STEEL:

Value of international transactions as admitted by the assessee

Rs.52,23,28,558/-

Adjustment for differences as discussed above

SPCEN & SPCD Rs.58,07,322.24

SPCEN-HMI &

SPCD-HMI

Rs.2,69,34,151.10

Less: Amount be reduced from purchase cost and added to total income Rs.2,836,373.00

Rs.2,99,05,100/-

Arm's Length Price

now determined at

Rs.49,24,23,458/-

Total value of adjustments

made as discussed above Rs.2,99,05,100/-

8. Hence, the Assessing officer may accordingly compute the total income of the assessee in accordance with subsection (4) of Section 92C of Income Tax Act, after giving an opportunity to the assessee. It is hereby clarified that the findings and discussions made in this order are applicable only in respect of reference received for Assessment Year 2003-04 and not for subsequent Assessment Years.

Addl. Commissioner of Income Tax
Transfer Pricing Officer-II(i/c)
Chennai 600 034."

64. As mentioned above, when the matter was on appeal before the CIT(A), remand report was called for from the TPO and report dated 10.02.2016 was submitted. It is relevant to extract the following paragraph of the said report:

"Accordingly the case was studied and it was noticed that the assessee adopted Comparable Uncontrolled Price Method (CUP) as the most appropriate method to arrive at Arm's Length Price. The company's activity

was to import steel mother coils from its Shareholder company M/s.Hyundai Corporation Korea. The assessee company adopted weighted average method for comparison of the transactions. While calculating the ALP, the assessee company had made an adjustment of 5% towards volume discount. The assessee company had claimed 5%-10% volume discount on the prices of Non-AE. On perusal it was noticed that the prices of Non-AE was much less than the prices of the assessee company. Hence, as the prices of Non-AE and AE is after volume discount, further allowance for volume discount was not called for and therefore, the claim of volume discount was not allowed. Accordingly, based on transaction to transaction analysis, the difference in the purchase prices a downward adjustment to the tune of Rs.2,99,05,100/- was made.

The assessee company had failed to provide comparable information during the TP proceedings, initiation of penalty u/s 271AA on the assessee company was suggested to the Assessing Officer.

Accordingly, the Assessing Officer added Rs.2,99,05,100/- to the total income of the assessee company and completed assessment u/s 143(3) of the IT Act, on 28.02.2006."

65. After recording the above facts, the TPO dealt with the additional grounds raised by the assessee requesting to adopt TNMM method for comparing the margin of the tested party and submitted some comparables after doing the comparability analysis. The TPO, after noting the said submission of the assessee, referred to the TP proceedings and the TP documentation submitted by the assessee stating that the CUP method is the MAM. The TPO holds that the stand taken by the assessee during the appeal proceedings resorting to TNMM method is only an after thought and cannot be accepted. The TPO does not state that the assessee is precluded from raising the issue. This is clear from the observations of the TPO, which follows after stating, that the plea is an after thought. We quote the said observation/finding:

"In the TP analysis, only in the absence of internal comparables, the external comparables will be taken for the comparability purpose using the TNMM method. But in assessee's case, the internal

comparables are very much available and also the various factors, that would be analysed in the CUP method, are also satisfied. The items purchased between AE and 3rd party were also very well comparable in the assessee's case. Hence CUP is the suitable method.

While analyzing the assessee's additional comparability analysis submitted during the appellate proceedings as additional grounds of appeal, the majority of the comparables are functionally different and they are into multiple activities. Also assessee has taken weighted average data pertaining to 3 financial years which is not in accordance with the extant rules.

In view of the above discussion, it is requested that assessee's additional grounds of appeal may be rejected and TPO's approach of adopting CUP method may be upheld."

66. A reading of the above report would clearly show that the assessee was not non-suited on the ground that he is estopped from raising the plea that TNMM method cannot be adopted as the MAM, but on facts, the TPO held that such plea is not tenable.

67. The matter went before the CIT(A), who took note of the report and then additional submissions were made by the assessee. No doubt, in one sentence, in the order passed by the CIT(A), there is an observation that the authorized representative of the assessee is resorting to approbate and reprobate and that is a species of estoppel and that substituting TNMM method for CUP method is an after thought.

68. If one reads these two sentences dis-juncted from the other portion of the order of the CIT(A), one may get an impression that the CIT(A) concluded that the assessee is estopped from raising a contention that they seek for adopting a different MAM. However, the order of the CIT(A) has to be read as a whole and in doing so, we have to read the order in its entirety, wherein the CIT(A) has referred to the earlier transactions, the grounds of appeal, the additional grounds of objections and then proceeded to adjudicate the matter. The CIT (A) referred to the remand report in extenso and held that the order passed by the TPO has answered the assessee's arguments and he has accepted the findings recorded by the Assessing Officer in the remand report and the speaking order passed by the TPO and accordingly confirmed the additions made.

69. Therefore, it would be incorrect to pick out couple

of sentences from the order of the CIT(A) and to state that the assessee has been shut out on the ground of estoppel, we are fully convinced that the assessee's case was dealt with on merits at every stage from the stage of the order passed by the CIT(A) as well as the remand report and the CIT(A) has recorded reasons as to why he is convinced on facts that the findings recorded by the TPO is an answer to the assessee's arguments.

70. Therefore, we are of the definite view that the assessee has not been non-suited on the ground of estoppel, but the entire matter has been analysed on facts and a finding has been rendered. This finding has been re-appreciated by the Tribunal, which can be seen from paragraph 8.0 of the order. No doubt, in paragraph 11.0, the Tribunal made an observation that the reopening of assessment is possible as per the provisions of Section 147 of the Act. In our view, such issue will not raise in the present case.

71. We have, in the preceding paragraphs while answering the substantial question of law No.1, have assigned reasons as to why the assessee is precluded from raising any contention with regard to the jurisdiction of the officer to issue notice dated 28.03.2006 apart from rendering a finding as to the purport and scope of the notice qua the assessment order under Section 143(3), dated 28.02.2006 and the order dated 16.03.2006 under Section 92CA(3) of the Act.

72. For the above reasons, we hold that there is no summary rejection of the assessee's plea that TNMM alone should be adopted, but findings of fact have been recorded and affirmed by the last fact finding forum, namely the Tribunal. Therefore, substantial questions of law 2 and 3 are answered against the assessee.

73. With regard to substantial question of law No.4, the assessee would submit that in CUP method, necessary adjustments are required to be made in order to arrive at the ALP and under Rule 10B(1)(a)(ii), the price can be adjusted to account for any differences between the international transaction.

74. The learned counsel for the appellant has elaborately referred to the "volume discount", which is based upon the quantity purchased. Further, it is contended that under Rule 10B(3), if accurate adjustments are not made to a comparable to eliminate effects of material differences, then such comparable ceases to be an uncontrolled transaction and consequently, no ALP can be determined based on that comparable.

75. We find that this issue has been elaborately dealt with by the TPO as well as examined for its correctness by the

CIT(A) and the Tribunal. We remind ourselves that we are exercising jurisdiction under Section 260A of the Act and required to answer a substantial question of law and not re-appreciate the factual position.

76. Therefore, we find that there is no substantial question of law arising for consideration on this issue. Accordingly, the same stands rejected.

77. With regard to substantial question of law No.5, the assessee would contend that the Tribunal fell in error in remanding the issue of trading segment to the CIT(A) when all the facts to adjudicate the issue were before it and applicability of CUP method itself was in question.

78. In the preceding paragraph, with regard to the most appropriate method, we have affirmed the finding of the authorities as confirmed by the Tribunal. While considering this question of law, we need to take note of the conduct of the assessee, which has been recorded in paragraph 9.0 of the impugned order, which is to the following effect:

"9.0 Ground No.5 is related to the addition on account of difference in SPCEN and SPCD Trading Grades.

The Assessee argued that both the SPCEN and SPCD Trading Grades are different degrees in comparability, characteristics for applying the CUP method. However, no evidence is placed before us to establish the argument. The Ld.AR argued that this ground was raised before the CIT(A) but the Ld.CIT(A) has not adjudicated the ground and hence requested to remit the matter back to the file of CIT(A) for adjudication. The Ld.AR did not make any objection for remitting the matter back to the file of the CIT(A)."

79. As could be seen from the finding recorded by the Tribunal, it is the assessee, who had requested to remit the matter back to the CIT(A) for adjudication, for which the Revenue did not object and accordingly, the matter was remanded back to the CIT(A) to decide the same on merits. Before us, the assessee does not state that no such request was made to the Tribunal, but rather seek to argue the matter on merits stating that comparison of SPCEN with SPCEN-HMI is not appropriate and that the assessee's case is supported by Mill Test Certificate produced for the imports made by the assessee.

80. These issues cannot be adjudicated by us in an appeal under Section 260A and the assessee, having pleaded before the Tribunal for a remand, which was not objected to by the Revenue, is precluded from now contending before this Court that the Tribunal fell in error in remanding the issue of trading segment to CIT(A).

81. Therefore, we find there is no substantial question of law on this issue and accordingly, the same is rejected.

82. In the result, the Tax Case Appeal stands dismissed and all the substantial questions of law raised in this appeal are answered against the appellant-assessee. No costs.

Sd/-

Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

hvk

To

1. The Income Tax Appellate Tribunal,
'D' Bench, Chennai.
2. The Commissioner of Income
Tax (Appeals) - 3, Aayakar Bhawan,
Mahatma Gandhi Road, Chennai.
3. The Income Tax Officer (OSD),
Company Circle V (2), Chennai.

+1cc to Mr.T.Ravikumar, Senior Standing Counsel, S.R.No. 17823

+1cc to Mr.Sandeep Begmar, Advocate, S.R.No. 17651

TCA.No.458 of 2018

GSM(CO)
GN(30/06/2021)

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