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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ITA 378/2019**

THE PR. COMMISSIONER OF INCOME TAX -3

..... Appellant

Through: Mr. Aseem Chawla, Sr. SC
with Mr. Pratishtha Chaudhary,
Mr. Naveen Rohila, Advs.

versus

FRESENIUS KABI ONCOLOGY LTD Respondent

Through: Ms. Venkita Subramonaim T.R.
and Mr. Rabat Bansal,
Advocates.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE PURUSHAINDR KUMAR
KAURAV**

ORDER

05.02.2024

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1. The Department questions the correctness of the judgment handed down by the Income Tax Appellate Tribunal ["ITAT"] dated 03 October 2018. Although various questions of law are proposed in the memo of appeal, Mr. Chawla, learned counsel, has in his usual fairness submitted that it is the question extracted below which alone would appear to arise for consideration:-

"1. Whether the Hon'ble Income Tax Appellate Tribunal ("ITAT") is right in upholding the order of the Hon'ble Commissioner of Income Tax (Appeals) [CIT(A)], thereby deleting the respective Transfer Pricing Adjustment(s) with regard to international transaction(s) of sale of Paclitaxel, Disodium Pamidronate and purchase of Methelene Chloride Soluble ("MCS") by relying upon Transitional Net Margin Method ("TNMM") instead of Comparable Uncontrolled Price Method ("CUP"), as the 'Most Appropriate Method' for the purposes of determination of Arm's Length Price in terms of Section 92C of the



Income Tax Act, 1961 read with Rule 10B & 10C of the Income Tax Rules, 1962.”

2. We note that insofar as the question proposed is concerned, it essentially revolves around the orders framed by the Transfer Pricing Officer [“**TPO**”] pertaining to the international transactions of sale of Paclitaxel and Disodium Pamidronate, in terms of which the pricing as proposed by the assessee based on the Transactional Net Margin Method [“**TNMM**”] was not accepted and the TPO essentially came to conclude that it would be the Comparable Uncontrolled Price [“**CUP**”] method which was liable to be viewed as the most appropriate method for the purposes of determining Arm's Length Price [“**ALP**”] in accordance with Section 92C of the Income Tax Act, 1961 [“**Act**”].

3. Insofar as Paclitaxel and Disodium Pamidronate are concerned, we note that the ITAT has taken into consideration the fact that the TPO while rejecting the price as proposed had merely relied upon prices prevailing in different markets and regions. It is on the aforesaid basis that the Commissioner of Income Tax (Appeals) [“**CIT(A)**”] came to conclude that the TPO had clearly failed to bear in mind the factors which imbue Rule 10B(2) of the Income Tax Rules, 1962 [“**Rules**”]. The CIT(A) rendered the following observations while dealing with the aforementioned two products:-

“14.2 The Appellant contended that the Ld TPO has not demonstrated through analysis within norms of Rule 10(B)(2) as to how the CUP method which requires high degree of comparability has been taken as MAM. The Appellant further contended that Ld. TPO has not shown that the data taken from International Business Information Services is uncontrolled transaction. Besides this, there were differences on account of following factors which TPO could not reconcile before applying CUP:

- Profile of customer whether reseller, distributor or end user is not confirmed;



- Pricing terms as to trade discounts, turnover discounts, cash discounts, return policy as such has not been compared;
- Pricing impact on geography of UK versus Argentina has not been determined;
- Quality of Product whether generic or otherwise and other variables have not been determined.

14.3 Given the above factors and non reconciliation of some of basic comparability norms, the Appellant contended that the CUP cannot be appropriately applied. The submissions of the Appellant have been duly considered. It is true that CUP method which calls for direct comparison of price is far more stringent method and requires for accurate information to make accurate comparison and adjustment. Admittedly, it seems that no comparison has been done by the Ld. TPO in relation to sale of Paclitaxel and Disodium Pamidronate with uncontrolled transaction. A mere price comparison of controlled transaction of Appellant with uncontrolled transaction as taken from database is gross error as far as application of CUP method is considered. Given the difficulty in application of CUP method, the Appellant conceded that they had applied a more tolerant TNMM Method where most of differences on account of functions and risks are ironed out at net level. The Appellant submitted that its net margins are higher than the average of net margins as earned by independent comparable companies. Besides the overall margin comparison of Appellant Company, the Appellant also produced as additional evidence regarding segmental net margin analysis of its UK branch through which sale of Paclitaxel and Disodium Pamidronate happened. The net margin analysis of UK Branch is reproduced below:

Particulars	Basis of Allocation	Total	Sale of Paclitaxel & Disodium Pamidronate to UK Subsidiary	Other sales
Export Sale	Actual	68,22,14,699	1,83,31,367	66,38,83,332
Interest Received	Revenue	96,257	2,586	93,671
Misc. Receipts	Revenue	81,459	2,189	79,270
Exchange Gain/Loss	Revenue	18,21,564	48,946	17,72,618
Total (A)		68,42,13,978	1,83,85,088	66,58,28,890
Purchases	Actual	52,02,98,766	1,47,17,528	50,55,81,238
Packing, freight & Forwarding	Revenue	43,273	1,163	42,111
Salary	Revenue	19,24,190	51,704	18,72,486
Charges General	Revenue	1,34,92,684	3,62,554	1,31,30,131
Commission,	Actual	1,95,09,823	-	1,95,09,823



Discount & Rebate				
Insurance	Revenue	7,67,718	20,629	7,47,089
Telephone	Revenue	69,02,767	1,85,480	67,17,287
Membership & Subscription	Revenue	11,49,856	30,897	18,65,036
Repairs – Others	Revenue	41,82,212	1,12,378	40,69,834
Sales Office Exp.	Actual	6,55,146	-	6,55,146
Advertisement	Actual	2,83,07,088	-	2,83,07,088
Legal & Professional Exp.	Revenue	92,64,051	2,48,929	90,15,123
Stationery & Printing	Revenue	72,554	1,950	70,604
Bank Charges	Revenue	2,02,072	5,430	1,96,643
Depreciation	Revenue	2,34,038	6,289	2,27,750
Total Expenses (B)		60,89,22,772	1,57,96,426	59,31,26,346
EBIT		7,52,91,206	25,88,662	7,27,02,544
EBIT (%)		11.0%	14.1%	10.9%
Sales Ratio		100%	3%	97%

From above table, it can be seen that the net margins earned from sale of Paclitaxel and Disodium Pamidronate is higher at 14.10% versus other sales at 10.90%.

14.4 I find force in the submissions of the Appellant, as it has supported its arguments with proper analysis and facts. The TPO has simply used database of export rates maintained by IBIS which satisfying the stringent conditions of comparability regarding CUP method. It is well known fact that pricing of a drug is greatly influenced by fact whether it is generic or otherwise. Quantity of drug and geographical location of buyer are other very crucial factors which determine pricing, TPO has not satisfied even these basic requirements. In view of these facts and circumstances, TNMM is considered as MAM and the appellant has demonstrated by applying TNMM that its margin is better than that of comparables. In light of the above evidences and circumstances of the case, I am of view that international transaction of sale of Paclitaxel and Disodium Pamidronate satisfy the arm's length principle and it does not warrant an addition as done by the Ld. AOITPO. Accordingly, I hold that the addition of (Rs 98,79,900 + 67,35,902) Rs 1,66,15,802 deserve to be deleted. The ground of appeal is accordingly allowed."

4. It was also found by the CIT(A) that the net margins earned from sale of Paclitaxel and Disodium Pamidronate is higher at 14.10% as against other sales at 10.90%. Ultimately and on due consideration of the view taken by the CIT(A), the ITAT came to conclude that in



the absence of the appellant having produced any material which could have cast a shadow of infirmity on the findings recorded, there appeared to be no justification to interfere with the CIT(A)'s order.

5. That then takes us to consider the transfer pricing adjustment which was made in respect of Methylene Chloride Soluble extract from the associated enterprise of the assessee - Dabur Nepal. Here too, the assessee had adopted the TNMM as the most appropriate method and which was rejected by the TPO who proceeded to invoke the CUP method for determining the ALP.

6. The TPO had ultimately come to conclude that the cost price per kg for the purposes of computing proposed adjustment was liable to be determined as being Rs.32 per kg. Before the CIT(A), the assessee had filed cost certificate and other material in support of its case that the cost price per kg was liable to be determined at Rs. 4648 per kg.

7. It becomes pertinent to note that although the cost certificate was introduced before the CIT(A) as additional evidence, and the TPO had doubted the veracity and correctness thereof, the appellant ultimately does not appear to have drawn the attention of the CIT(A) to any material which may have cast a doubt on the claimed cost being Rs. 4648 per kg. We further note that the veracity of the cost certificate is also not a question which appears to have been urged before the ITAT by the appellant.

8. In that view of the matter, we find that the issues essentially remain findings of fact which could have been plausibly rendered bearing in mind the evidence which was submitted for the consideration of the CIT(A).

9. We consequently note that no substantial question of law arises.



Therefore, we find no reason to interfere with the impugned order of the ITAT.

10. The appeal fails and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINdra KUMAR KAURAV, J.
FEBRUARY 5, 2024/*neha*