

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“J” BENCH, MUMBAI**

**BEFORE SHRI PRAMOD KUMAR, VP &  
SHRI KULDIP SINGH, JM**

आयकरअपील सं./I.T.A. No . 3781/Mum/2011 (   
**निर्धारणवर्ष/Assessment Year: 2004-05)**

DCIT Rg. 8(2), R. No. 216,-A, Aayakar Bhavan, M. K. Road, Mumbai-400 020	<b>बिधम/ Vs.</b>	M/s. Pfizer Ltd., Pfizer Centre, Patel Estate, Off. S. V. Road, Jogeshwari (W), Mumbai- 400 012
स्थायीलेखासं./जीआइआरसं./ P A N No . AAACP3334M		
(अपीलाथी/ <b>Appellant</b> )	:	(प्रत्यथी / <b>Respondent</b> )

CO No.46/Mum/2012

आयकरअपील सं./Arising out of I .T.A. No . 3781/Mum/2011 (   
**निर्धारणवर्ष/Assessment Year: 2004-05)**

M/s. Pfizer Ltd., Pfizer Centre, Patel Estate, Off. S. V. Road, Jogeshwari (W), Mumbai-400 012	<b>बिधम/ Vs.</b>	Pfizer Centre, Patel Estate, Off. S. V. Road, Jogeshwari (W), Mumbai- 400 012
स्थायीलेखासं./जीआइआरसं./ PAN No . AAACP3334M		
(अपीलाथी/ <b>Appellant</b> )	:	(प्रत्यथी / <b>Respondent</b> )

अपीलाथीकी ओरसे/ <b>Appellant by</b>	:	Shri Vishal Kalra, Ld. AR
प्रत्यथीकी ओरसे/ <b>Respondent by</b>	:	Shri Ashish Heliwal, Ld. DR

सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	02.12.2021
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	31.12.2021

आदेश/ORDER

**PER KULDIP SINGH (JUDICIAL MEMBER):**

1. The Assistant Commissioner of Income Tax, Range(2), Mumbai [hereinafter referred to as the revenue] by filing of aforesaid appeal sought to set aside impugned order passed by AO u/s 143(3)/144C(13) for AY 2004-05 on the grounds interalia that:-

1. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the Transfer Pricing Adjustment" of Rs.3.71 crores made u/s. 92CA(3) of the Act, without appreciating the facts of the case.'*

2. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in ignoring TPO's comparable set of 3 companies, which includes only one comparable selected by the TPO i.e. Siro Clinpharm Pvt. Ltd. & other two by the assessee and was also confronted to the assessee during the transfer pricing proceedings.*

3. *"On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the Transfer Pricing Adjustment of Rs.2.34 crores related to the Import of Finished Drugs Formulation ('FDFs') (i.e. Minipress') from the AEs, without appreciating the facts of the case.*

4. *"On the facts and in the circumstances of the case and in law, the Ld. CIT (A) erred in ignoring TPO's*

*adjustment of Rs.2.34 crores, based on the comparison of the assessee's operating loss of 16.90% with the average operating profit margin of comparable companies of 3.47%, without distinguishing the finding of the TPO and working of the ALP and deciding the issue solely on the basis of the submission made by the assessee".*

*5. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance related to Market Research Expenses of Rs.73,29,752/-, without appreciating the facts of the case.*

*6. "On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding to Market Research Expenses as revenue expenditure, without appreciating the fact that the expenses in the nature of Marketing Research yield enduring benefit to the assessee, spread over several years". ""\**

*7. "On the facts and in the circumstances of the case and-in-law, the Ld. CIT (A) erred in directing the A.O to allow depreciation on plant and machinery of Ankleshwar Plant solely on the basis of the decision of ITAT in A. Y. 2001-02, disregarding the fact that the said unit had stopped operations in F. Y. 99-2000".*

*2. The appellant prays that the order of the CIT (A) on the above ground be set aside and that of the A.O. be restored.*

*3. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.*

2. Briefly stated facts necessary for adjudication of the controversy at hand are:

The Assessee is into the business of manufacturing and trading in pharmaceutical and healthcare products as well as in the export

of goods and services. During the year under consideration assessee entered into international transactions with its AEs as under:-

Sl.	AE	Transaction	Value [Rs. in crores]
1	5 AEs	import of raw materials	6.30
2	3 AEs	Export of finished goods	7.69
3	4 AEs	Import of trading goods	9.25
4	4 AEs	Royalty Paid	4.08
5	4 AEs	Services for clinical research	17.00
6	3 AEs	Reimbursements	2.28
		Total	46.63

Assessee in order to benchmark its international transaction qua provisions of clinical services rendered to associated enterprises proceeded on the premise that assessee merely acts in the capacity of intermediary or coordinator between its AEs and its institution / hospitals. Assessee in order to benchmark its international transactions applied TNMM with Operating Cost /Total cost (OP/TC), chosen 9 comparables with arithmetic mean of 9.84 % as against assessee's own margin of 19.57 and found its transactions within + - 5% range. However, Ld. TPO rejected the 7 out of 9 comparables, followed the earlier years TP orders for AY 2002-03 and 2003-04 taken Clinpharm Pvt. Ltd. as an additional comparables and computed the marginal of 3 comparables at 12.52% and thereby proposed adjustment of Rs.

371,00,000/- towards provisions of clinical study management and sport services.

Assessee in order to benchmark its international transaction qua import of Minipress for trading purposes for resale in Indian market claimed that it has incurred an operating loss of 16.90% from the sale of said product whereas margin as earned by comparable companies was 3.47% on sales and claimed economical adjustment by eliminating the difference created on account of marketing and distribution expenses. However, TPO in order to benchmark this transaction compared margin of comparable companies @ 3.47% with operating loss incurred by the assessee at (-) 16.9% and made adjustment of Rs. 234,00,000/-.

3. In order to benchmark the international transactions qua provision of clinical study management and monitoring sport services, Ld. TPO accepted TNMM with Operating Profit /Total Cost (OP/TC) applied by the assessee, however rejected 7 comparables out of 9 comparables chosen by the assessee by following AY 2002-03 and 2003-04 and thereby introduced 1 additional company as comparable namely Choksi Labs Ltd. and finally selected 3 comparables as under:-

SI	Company Name	Operating margin on operating costs.
1	Vimta Labs Ltd.	26.08%
2	Choksi Labs Ltd.	27.98%

3	Siro Clinpharm Pvt. Ltd.	22.52%
	Mean	25.52%

4. Accordingly, Ld. TPO computed the operating margin on operating cost mean at 25.52% as indicator as against 19.57% margin on cost earned by the assessee and thereby proposed adjustment of Rs. 371,00,000/-.

5. Consequently, AO framed the assessment at Rs.74,88,90,940/- u/s.143(3) Act.

6. We have heard the ld. ARs of the parties to the appeal, perused the order passed by lower Revenue authorities in the light of the facts and law brought on record.

7. On the other hand, Ld. CIT(A) by accepting the contention raised by the assessee by following the decision rendered by Coordinate Bench of Tribunal in case of DCIT vrs. Chiel Communications India Pvt. Ltd. ITA No. 712/Delhi/2010 that „Pass-through Cost“ needs to be removed from the cost base and thereby accepted the operating margin computed by the assessee at 19.57% on cost as per the working u/s 92C(2) of the Act made as under:-

Application of the proviso to Section 92C(2) of the Income Tax Act, 1961 in the case of CSMM			
Particulars	Profit & Loss Account	Considering OP/Sales as PLI (Average)	
Revenue less pass-through	100,813		105,827
<i>Less Operating Expenses less pass-through</i>	84,311	84,311	

Operating profit (OP)	16,502		21,516
OPM(OP/Total Cost)	19.57%		
Arm's length price of exports (ALP)			25.52%
Arm's length price of exports (ALP)		105,827	
Application of the rang-ALP x 1.05		111,119	
Application of the rang-ALP x 0.95		100,536	

8. Ld. CIT(A) directed the TPO to treat the adjustment of Rs. 3.71 crores at NIL.

9. Ld. DR for Revenue to support his arguments relied upon the order passed by Id. TPO. However, Ld. AR for the assessee brought to our notice that this identical issue as to "pass-through cost" to be removed from the cost base for computing operating margin has already been decided in favour of the assessee in its case for AY 2002-03 in ITA No. 3098/Mum/2006 order dated 08.03.2013 and AY 2003-04 in ITA No. 3729 & 3424/Mum/2008 order dated 06.11.2015.

10. When we examine Gr. No. 1 & 2 raised by revenue qua TP adjustment of Rs. 3.17 crores pertaining to provision of clinical study management and monitoring sport services in the light of the findings rendered by Ld. CIT(A) in para 2.5.19 in the impugned order, it is apparently clear that when the issue as to removing "the pass-through cost" from the cost base in order to compute the operating margin decided in assessee's own case in

A.Y.2002-03 in its favour has not been further challenged by the revenue, Ground No. 1 & 2 raised by the assessee have become infructuous. Because even by taking TPO's comparables as correct one, assessee's margin comes to 19.57% as against margin of 25.52% of comparables, which falls within + 5% range and in this situation, no adjustment is warranted.

11. We have perused the order passed by Coordinate Bench of Tribunal in assessee's own case for AY 2003-04 in which identical issue has been decided in favour of the assessee by rendering the following findings:-

*24. We have considered the submissions of the parties and perused the material available on record. On a perusal of the order passed by the Co-ordinate Bench of the Tribunal in assessee's own case cited supra, it is seen that the Tribunal while deciding identical issue, held as under:-*

*"24. We have considered the rival submissions and also perused the relevant material on record. We agree in principle with the contention of the ld. Counsel for the assessee on this issue that if the indirect cost was already included by the assessee in the total cost of Rs. 1080.25 Lakhs incurred in relation to the services provided to its AE for applying the mark up of 10%, there is no justification in adding indirect cost @ 5% of the direct cost separately as done by the authorities below relying on the terms of the relevant agreement. However, as submitted by the ld. DR, the stand taken by the assessee about inclusion of indirect cost of Rs. 285.48 Crores in the total cost of Rs. 1080.25 Lakhs based on the break-up given on Pg.Nos. 58 & 59 of the Paper Book requires verification as there is no reference to any such details furnished by the assessee in the order of the authorities below nor there is any finding given on verification of such details. Since the ld. Counsel for*

*the assessee also has no objection in this regard, we restore this issue to the file of the AO to verify from the relevant record, the stand taken by the assessee that indirect cost of Rs. 285.48 Lakhs was already included in the total cost of Rs. 1080.25 Lakhs and if the same is found to be correct, the AO is directed not to add separately indirect cost @ 5% of the direct cost for the purpose of Transfer Pricing exercise. Ground No. 2(d) is accordingly treated as allowed for statistical purposes.”*

*25. The fact and issue being materially same, respectfully following the aforesaid decision of the Tribunal in assessee’s own case, we remit the matter back to the file of the Assessing Officer for deciding matter afresh in terms with the direction of the co-ordinate bench (supra) after providing adequate opportunity of being heard to the assessee. This ground is allowed for statistical purposes.*

12. So, we are of the considered view when issue as to removing “the pass-through cost” from the cost base for computing operating margin has already been decided by the Coordinate Bench of Tribunal in assessee’s own case in its favour no adjustment in the given circumstances, even by taking comparables chosen by the TPO as correct one is warranted. However, AO is directed to verify the facts as to the claim of the assessee qua “pass-through cost”, if correct to allow the same. Consequently, we are of the considered view that Ld. CIT(A) has legally and validly decided the issue in favour of the assessee, hence ground no. 1 & 2 are determined against revenue.

### **Ground No. 3 & 4**

13. Transfer price adjustment made by the TPO to the tune of Rs. 2,34,00,0000/- qua international transaction pertaining to

import of Finished Drugs Formulations (FDF) i.e. Minipress for trading purposes, deleted by Ld. CIT(A) is under challenge before the Tribunal.

14. Undisputedly, TPO compared the margin of the comparable companies i.e. 3.47% with operating loss incurred by the assessee i.e. -16.90%. It is also not in dispute that Ld. TPO had taken note of the fact that in AY 2003-04, margin at 3.41% was adopted to determine the arm's length price of import of Minipress for the purpose of trading. It is also not in dispute that assessee imported finished goods Minipress for the purpose of trading for Rs. 80,814,000/- and Minipress constitute the majority of import of finished goods for the purpose of trading totally at Rs. 90,651,000/-. In view of the aforesaid undisputed facts, TPO determined the arm's length price as under:-

		(Rs. in 000)
A	Sales [as per the segmental financials furnished]	115,055
B	Arm's length margin @ 3.47%	3,992
C	Arm's length total Cost [A-B]	111,063
D	Total Cost [as per the segmental financials furnished]	134,496
E	Difference [D-C]	23,433

15. However, Ld. CIT(A) deleted the TP adjustment on the ground that profitability trend of the product from FY 2001-02 to 2009-10 is apparent and the assessee has suffered loss in FY

2004-05 only which is not on account of transaction with the related parties rather it was due to incurring substantial marketing expenses in the initial years. Ld. CIT(A) thrashed the facts brought on record by the assessee and reached to the conclusion that price of the import of Minipress for trading purpose is at arm's length if the underlying economics is given due importance, because in the initial years businessman keeps the business strategy of marketing perceptions in mind.

16. Ld. DR for the revenue by relying on the order passed by TPO contended that TPO has rightly determined the ALP of international transactions by keeping in mind the preceding year margin of 3.41%.

17. On the other hand, Ld. AR for the assessee by relying on the order passed by Ld. CIT(A) contended interalia that economic adjustment keeping in view the various commercial and business reasons like marketing cost needs to be considered as the assessee performed greater marketing and sales functions vis-à-vis comparables. Even the cost incurred by the assessee is 21.74% on sales as compared to average marketing expenses incurred by comparables of 4.31% on sales only and as such the difference created on account of marketing and distribution expenses needs to be eliminated.

18. Ld. AR for the assessee further contended that since the assessee acts in the capacity of normal risk distributor and re-sale price method (RPM) is most appropriate method to benchmark

the transactions in case of normal risk distributor. The gross margin earned by the assessee from import and resale of Minipress was 7.94% of sales while gross margin earned by comparable companies was 11.41% giving +/- 5% range as provided u/s 92C(2) of the Act. Ld. AR also brought on record profitability trend in a tabulated form which is as under

FY	01-02	02-03	03-04	04-05	05-06	06-07	07-08	08-09	09-10
Net Margin (% on sales)	3.49%	- 12.38%	-16.90%	7.205	18.66%	23.73%	33.56%	22.45 %	23.17 %

19. When we examine the arguments addressed by Ld. AR for the assessee in the light of the profitability trend which is from FY 2004-05 to 2009-10, the assessee has recorded substantial increase in the sales and operating margin in 4<sup>th</sup> year. The operating loss incurred during the year under consideration is certainly not on account of transfer pricing of the product, a rather due initial business strategy of marketing penetration adopted by the assessee. During the initial years for which, Ld. CIT(A) has rightly provided the economic adjustment, hence rightly deleted the transfer pricing adjustment pertaining to import of Minipress for trading purposes. So, Ground no. 3 & 4 are determined against revenue.

### **Ground No. 5 & 6**

20. Disallowance of Rs. 73,29,752/- made by AO on account of market research expenses deleted by the Ld. CIT(A) are under challenge before the Tribunal. Ld. CIT(A) deleted the additions

by following the order passed by Tribunal for AY 2002-03 and 2003-04 on identical issues by rendering the following findings as under:-

*I have considered the facts of the case and gone through the appellate orders for AY 2003-04 and AY 2002-03. It is generally seen that in case of pharmaceutical companies, market research is conducted to analyse market trends, provide competitive intelligence and determine the scope, size and key drivers of the therapeutic categories in which the said companies operate. It is also clear that the activity of carrying out such market research is a routine affair. The matter has also been decided in favour of the appellant in the aforesaid appellate orders. Further, in the assessment order, the AO has not brought any material on record to show that there was a difference in the facts or any changes in legal position on this issue subsequent to the passing of the said orders. Accordingly, following the CIT(A)'s order for AY 2003-04 and ITAT's order for AY 2002-03, the appellant's claim of treating the market research expenditure as revenue in nature is accepted. Accordingly, this ground of appeal is allowed.*

21. We have perused the order passed by Coordinate Bench of Tribunal in assessee's own case for AY 2002-03 and 2003-04 which is on identical facts. When the identical expenses claimed by the assessee have already been allowed by the Tribunal in AY 2002-03 and revenue while accepting the decision of the Tribunal deleted the identical expenses in AY 2000-01 which has been accepted, we find no reason to interfere into the findings returned by Ld. CIT(A) while following the rule of consistency. Moreover, market expenses are an incredible part of the business in the pharmaceutical field and it is not the case of the revenue that any new product has been introduced by the assessee during the year under consideration. So, the findings rendered by Ld.

CIT(A) are hereby upheld. Consequently, Ground No. 5 & 6 are determined against revenue.

**Ground No. 7**

22. AO by relying on the order passed in preceding years order disallowed the depreciation of Rs. 27,623,376/- claimed by the assessee on plant and machinery of Ankleshware Plant. However, Ld. CIT(A) allowed the depreciation by following the decision rendered by Coordinate Bench of Tribunal in assessee's own case for AY 2000-01. Ld. DR for the assessee challenged the impugned disallowance of depreciation by Ld. CIT(A), on the ground that when the said unit has stopped operations in 2019 to 2020, there is no question of following earlier decisions.

23. We are of the considered view that this contention of the Ld. DR is not tenable because once the asset is purchased and enters into a particular block of assets, the same is not individually identifiable as depreciation is available on the entire block of assets in view of section 32 of the Act. Moreover, this issue has been successively decided in favour of the assessee from AY 2001-02 to 2003-04 vide order dated 18<sup>th</sup> March 2010 passed in ITA No. 8821/Mum/2004 by Coordinated Bench of Tribunal in para 17 of the order (supra) has duly examined the contention raised by Ld. DR, which are as under:-

*17. This order was upheld by the Hon'ble Bombay High Court in ITA No. 598 of 2009 dated 28th July 2009 by following the judgement in the case of Whittle Anderson Ltd. vs. CIT 79 ITR 613 and in the case of CIT vs. G.N.*

*Agarwal (Individual) 217 ITR 250. In view of this, since the assets have become part of the block of assets the assessee is entitled to depreciation. The learned D.R.'s reliance on the decision of CIT vs. McDowell Company Ltd. 224 CTR 22 is not directly applicable here. In the above said case the stand of the Revenue was that machinery in respect of R&D Section was related to the fast food unit, which was closed and therefore was not entitled to any depreciation because there is no actual usage of the machinery. The stand of the assessee, on the other hand, was that the machinery was used in respect of fast food and liquor units. The Hon'ble Supreme Court held that the basic issue is whether it relate to both the units or only to fast food unit, which was ultimately closed has not been examined in detail. Therefore the matter was remitted to the A.O. to examine this aspect. Since the issue before the Hon'ble Supreme Court was with reference to use of R&D machinery pertaining to liquor as well as food business the same was restored back to the A.O. for examining the factual aspects. However, in this case, the Ankleshwar Unit was being used for assessee's business and these are forming part of the block of assets and so the unit is deemed to have been used for the purpose of business and examination of usage of individual assets forming block of assets does not arise on the legal principles discussed above. In view of this we direct the A.O. to allow the depreciation.*

24. So, following earlier years order passed by the Co-ordinate Bench of Tribunal in assessee's own case, we find no scope to interfere into the findings rendered by Ld. CIT(A). Consequently, Ground No. 7 is determined against revenue.

**Ground No. 8 (Additional Ground)**

25. AO treated the rental income of Rs. 5,47,89,000/- received by the assessee from subleasing of commercial properties as income from business as against claim of the assessee being

income from house property on the ground that renting out of premises amounts to commercial exploitation for business purpose by the assessee. However, Ld. CIT(A) by relying on the order passed by Tribunal in assessee's own case for AY 1998-99, 1999-00, 2000-01 and 2001-02 qua identical issues deleted the additions.

26. We have perused the order passed by Ld. CIT(A) who has duly thrashed the facts that when the period of lease exceeds 12 years (including renewal period), it could be considered as the „deemed owner of the property“ within the meaning of section 27(iii)b) r.w.s. 269UA(f) of the Act. So, we find no scope to interfere into the findings rendered by Ld. CIT(A). Consequently, Ground No. 8 is determined against revenue.

24. In view of what has been discussed above, the appeal filed by the revenue is hereby dismissed. In view of application dated 2<sup>nd</sup> December 2021, the cross objections filed in this case are also dismissed as withdrawn having not been pressed.

*Order pronounced in the open court on 31<sup>st</sup> December 2021.*

*Sd/-*  
(Pramod Kumar)  
उपाध्यक्ष / Vice President

मुंबई Mumbai; यदनांक Dated :  
Sr.PS. Dhananjay

*Sd/-*  
(Kuldip Singh)  
न्याययकसदस्य / Judicial Member

31.12.2021

**आदेशकीप्रनिनिनिअग्रेनर्/Copy of the Order forwarded to :**

1. अपीलाथी/ The Appellant
2. प्रत्यथी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/CIT- concerned
5. यवभागीयप्रयतयनयध, आयकरअपीलीयअयधकरण, मुंबई/DR, ITAT, Mumbai
6. गार्डफाईल/Guard File  
आदेशधिसधर/BY ORDER,

डि/सहधयकिंजीकधर(Dy./Asstt.Registrar)  
आयकरअपीलीयअयधकरण, मुंबई/ITAT, Mumbai