

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'K' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.921/Mum/2021
(Assessment Year :2016-17)**

M/s. ASB International Pvt.Ltd. E-9, MIDC, Additional Ambarnath Industrial Area, Anand Nagar Ambarnath East 421 506	Vs.	Additional / Joint / Deputy / Assistant Commissioner of Income Tax / Income Tax Officer, National eAssessment Centre, Delhi
PAN/GIR No.AAACA8424F		
(Appellant)	..	(Respondent)

Assessee by	Shri Paras Savla / Shri Harsh Shah / Shri Pratik Poddar / Ms. Akshita Bhandari
Revenue by	Shri Asif Karmali
Date of Hearing	31/05/2023
Date of Pronouncement	25/08/2023

□□□□ / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against final assessment order dated 28/03/2021 passed u/s.143(3) r.w.s. 144C(13) in pursuance of direction given by the DRP dated 04/03/2021 u/s.144(5).

2. In the grounds of appeal, assessee has raised the following grounds:-

On the facts and circumstances of the case and in law, the learned Transfer Pricing Officer (TPO)/ the learned Assessing Officer (AO) under directions of the Hon'ble Dispute Resolution Panel (DRP) erred in making an addition of Rs. 11,17,91,252/- to the total income of the Appellant based on provisions of Chapter X of the Income-tax Act, 1961 ('the Act') without appreciating that the Appellant's transaction of payment for royalty was at arm's length.

2. *On the facts and circumstances of the case and in law, the learned TPO and the learned AO under directions of the Hon'ble DRP erred in rejecting the Appellant's benchmarking, which demonstrated that the transaction of payment for royalty was at arm's length, without appreciating that the Appellant's methodology meets the provisions laid down in Rule 10AB of the Income-tax Rules, 1962, read with section 92C(1)(f) of the Income-tax Act, 1961, and is the most appropriate method in the present facts.*

3. *On the facts and circumstances of the case and in law, the learned TPO and the learned AO under directions of the Hon'ble DRP erred in benchmarking the Appellant's transaction of payment for royalty by selecting the Comparable Uncontrolled Price (CUP) as the most appropriate method, and have also erred in selecting incorrect comparable instances.*

3. The other grounds raised for initiation of penalty proceedings u/s.271(1)(c) is premature, therefore, same is dismissed.

4. Facts in brief are that assessee is a wholly owned subsidiary of Nissei ASB Machine Co. Ltd. (ASB Japan' or 'AE), was set up as a 100% Export Oriented Unit ('EOU"). It is engaged in manufacturing of injection stretch blow molding machines, molds

and parts, components and subassemblies of machines and molds). The assessee has paid royalty of Rs.20,63,83,848/- as per the agreement dated 01/10/2010. It was stated that royalty payment was in connection with the technology received by M/s. ASB India and ASB Japan provides maintenance and enhancement of technical knowhow to ASB India. The assessee was required to pay royalty @12% and it is payable only in respect of net domestic sales. As per the original TP study report assessee had used overall entity level TNMM approach for benchmarking the royalty payment. Thereafter, assessee adopted 'Other Method' in its revised TP study report after explaining it in the following manner:-

“ASB International has paid royalty @ 12% of the net sales made by it in its Non-AE segment, to the AE. The Non-AE segment performs two functions - (i) the manufacturing function, and (ii) sales function.

Accordingly, the ideal rate of royalty payable by ASB International should be the profit earned by the Non-AE segment, as reduced by the profit reasonably attributable to the functions performed by such segment. In other words:

Royalty (Profit of Non-AE segment before royalty) less (Profit reasonably attributable to the functions performed by the Non-AE segment) Since the segmental accounts for Non-AE segment of ASB International could be determined and also since royalty is being paid at 12%, the first figure, i.e. profit before royalty, could be easily determined.

The second figure would be an aggregate of profits reasonably attributable to the manufacturing and the sales function. The profits earned by the AE segment (where the sales are made

only to the AE, and there are no intangibles involved), could form the basis for determining the manufacturing profits.

Since the arm's length profits of the AE segment is 2.46 % (details provided in Appendix H), the profits reasonably attributable to manufacturing function should be taken as 2.46% for the year under consideration. On the other hand, profits attributable to sales could be taken as 3%, this being the figure accepted and allowed to ASB International for past years for the sales function.

The computation works out as follows:

Particulars	FY 16-17
Royalty payment	12%
Non-AE segment profit (after royalty as per segmental results)	19.19%
Profit before royalty (A)	31.19%
Profit reasonably attributable to manufacturing	2.46%
Profit reasonably attributable to sales	3%
Profit attributable to Non-AE segment....(B)	5.46%
Royalty attributable (A)-(B)	25.73%

Considering the above, the international transaction of payment of royalty is at arm's length"

5. The ld. TPO observed that the 'Other method' adopted by the assessee has been rejected by the ld. DRP in A.Y.2014-15 and has upheld the CUP method as the most appropriate method for

benchmarking the transaction of royalty and directed the ld. TPO to take Optokos Corporation and DynEco Corporation by taking the average of royalty payments of these two agreements as CUP.

6. The ld. TPO finally adopted 5.5% as the royalty rate taking comparable companies of Optikos Corporation (which was 5%) and DynEco Corporation (which was 6%) held that arm's length price of the royalty transaction would be Rs.9,45,92,597/- and accordingly, adjustment of Rs.11,17,91,252/- was made. The ld. DRP has upheld the same following A.Y.2014-15 and 2015-

16.

7. Before us, ld. Counsel submitted that the Tribunal in assessee's own case for A.Y.2014-15 after detailed discussion had remitted back this issue to the file of the ld. TPO / ld. AO to adopt 'Other Method' as the most appropriate method as order dated 19/03/2023. Even the ld. DR admitted that this issue has been remitted back to the file of the ld. TPO / ld. AO after giving categorical directions.

8. The assessee during the year had submitted following benchmarking of royalty payment based on 'other method' to justify the arm's length price for payment of royalty.

Particular		OP /OR
Non-AE segment profit before royalty	A	26.38%*

Profit reasonably attributable to manufacturing function	B	2.46%
Profit reasonably attributable to trading function	C	3.00%
Profit attributable to Non-AE segment	D = B + C	5.46%
Royalty attributable	E = A-D	20.92%
Royalty Rate as per the Technical License Agreement (TLA)		12.00%

9. We find that this issue has been dealt in detail by this Tribunal after observing as under:-

“19. After considering the aforesaid submissions and facts and the material brought on record, the main controversy before us is, whether on the facts and circumstances, CUP is the most appropriate method for benchmarking the royalty payment made by the assessee to its AE; Or “Other Method” can be treated as MAM on the facts of the present case. Undoubtedly, CUP method is based on comparing the price of uncontrolled transactions which requires high degree of comparability and availability of comparables with similar products and market and agreements. It has been stated at length before us that, the intangibles involved in the transactions are very unique and therefore, it was for this reason it was very difficult to find a suitable comparable even under the Royalty STAT and this is the reason why both ld. TPO and ld. DRP found it difficult to find a suitable comparable. Even the two comparables which have been selected by the ld. DRP, i.e., Optikos Corporation and DynEco Corporation as noted above, are entirely different from the agreement of the assessee with its AE. The technical knowhow and R & D cost would be different than the

products which are subject to comparability under CUP. In a scenario where it is difficult to identify the comparables under CUP method and the search in Royalty STAT data has not thrown appropriate comparables and looking to the unique and valuable intangibles which has been licensed to the assessee, we are unable to uphold that the CUP could be the most appropriate method in the case of the assessee.

20. In so far as other methods are concerned, i.e. RPM, CPM and PSM, the same are ostensibly are not applicable which has been admitted by both the parties. Even the TNMM also as agreed by both the parties under these facts are also not applicable because TNMM is one sided method which makes it difficult to apply in the cases where royalty transactions have been benchmarked wherein there is a transfer of valuable intangibles and therefore, TNMM would not give accurate results.

21. The „other method“ as per Rule 10B reads as under:-

10AB. *For the purposes of clause (f) of sub-section (1) of section 92C, the other method for determination of the arm's length price in relation to an international transaction [or a specified domestic transaction] shall be any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts.]*

Thus, „other method“ takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances. Even the OECD Guidelines prescribe the use of „other method“ in cases where the complexities of businesses make it difficult for application of the traditional methods. Further, at various instances the OECD Guidelines have encouraged the use of other methods, especially in the cases of hard-to-value intangibles. Paras 6.136 and 6.139 of the OECD Guidelines 2017 state that in cases of intangibles, where obtaining the comparables becomes difficult and the intangibles are unique and valuable in nature then the usual methods will not be able to provide reliable ALP.

22. Thus, the OECD Guidelines have also strongly encouraged use of an alternative method in involving transfer of intangibles where there arise practical difficulties in application of traditional methods. Thus on facts of the present case, when there is no comparable available that will be a perfect fit for valuing the intangibles licensed by ASD Japan, it will be preferable to adopt "Other method" as MAM to benchmark the price for paid for Royalty. This exercise also becomes relevant when all the comparables provided by the assessee has been rejected by the lower authorities and their inability to find any other comparable. Another reason for no comparables is the nature and characteristics of the intangibles itself which are unique and hard to value.
23. It is also relevant to mention here another qualitative aspect relating to the application of the „other method“ in the present case. The „other method“ reflects commercial pricing in the way it actually is determined after due negotiations between parties. In other words, the 'other method“ as is explained above suitably builds upon the perspectives of parties which transact with each other and determine pricing in an uncontrolled, unrelated manner. This party perspective is visible in the approach explained above since the pricing method identifies various functions performed by parties and settles the transaction price accordingly. The party perspective also appreciates the fact that the AE segment of the Assessee only carries out contract manufacturing and that the principal, i.e., ASB Japan, being the owner of intangibles, would command a considerable amount of royalty given that the business is critically dependent on research and development and the quality of intangibles, which is entirely the responsibility of ASB Japan. Compared to other methods such as CUP and TNMM, the „other method“ is more suitable, because the former methods do not factor in this party perspective and carry out a crude comparison with other companies without adjusting such comparison to the needs of the parties involved in the business group and transactions.

24. The „other method“ is also relevant because it is price-oriented. The „other method“ builds upon the price that would have been paid in an uncontrolled scenario. This is because this method, as explained above, directly involves percentages of segmental profits and arrives at the arm's length percentage of royalty given that the TLA also stipulates „royalty“ to be paid as a percentage of sales, the other method is directly applicable. This price-oriented approach is recognised by Rule 10AB as well which states that the other method can be any method which takes into account the price which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts. Thus, this price-orientation also supports the selection of the other method as the MAM for the Assessee.
25. Thus considering the above facts and circumstances, the method of the assessee can be pigeonholed in the „other method“ provided in Rule 10AB r.w.s. 92C (1) and in our opinion this is the MAM in the peculiar facts of the Assessee. Accordingly, we hold that „other method“ would be a good substitute for CUP as there is lack of reliable comparables and looking to the fact that the royalty payments have been made for unique intangibles, therefore, we direct the ld. TPO to adopt „other method“ as the Most Appropriate Method. However, the working given by the assessee before us as incorporated above needs to be examined afresh by identifying the costs and profits attributable to manufacture and sales to the non-AE and to find out appropriate allocation of the costs and what could be the profits on account of royalty which can be stated to be attributable on account of royalty. The assessee is directed to substitute the working on the basis of „other method“ . With this direction, all the grounds raised by the assessee are allowed for statistical purposes.”

10. Thus, in view of the aforesaid order of the Tribunal, we remand this matter back to the file of the ld. TPO / ld. AO to adopt ‘Other Method’ as the most appropriate method AND similar line of direction is given for this year also and to examine the working given by the assessee. Assessee would be at liberty to file any

additional documents / submissions to justify the benchmarking on the basis of 'Other Method'.

14. In the result, appeal of the assessee is partly allowed for statistical purposes.

Order pronounced on 25th August, 2023.

Sd/- Sd/-

(AMARJIT SINGH) (AMIT SHUKLA)

ACCOUNTANT MEMBER JUDICIAL MEMBER

Mumbai; Dated 25/08/2023

KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy// BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai