

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2691/Del/2014
(Assessment Year: 2009-10)

Federal Mogul Ignition Products India Ltd, (formerly known as Federal Mogul Automotive Products India Pvt Ltd, JR Complex, Gate No. 4, Mandoli, New Delhi PAN: AAACF4128M (Appellant)	Vs.	DCIT, Circle-11(1), New Delhi (Respondent)
--	-----	---

Assessee by :	Shri Himanshu Singh, Adv
Revenue by:	Shri HK Choudhary, CIT DR
Date of Hearing	15/02/2018
Date of pronouncement	14/05/2018

O R D E R

PER PRASHANT MAHARISHI, A. M

1. This is an appeal filed by the assessee against the order of the Id Dy.CIT, Circle-11(1), New Delhi (Id Assessing Officer) dated 21.02.2014 for the Assessment Year 2009-10 passed u/s 143(3) read with Section 144C of the Income Tax Act, 1961 (the Act) in pursuance of direction of the Id DRP-I, New Delhi (the Id DRP) dated 19.12.2013 on the draft assessment order passed by the Id Assessing Officer on 04.03.2013 wherein, the transfer pricing adjustment made by the Id Additional CIT (Transfer Pricing Officer-I(2), New Delhi (the Id TPO) of Rs. 18574221/- is proposed on account of **arm's length price of international transaction entered by the assessee.**
2. The assessee has raised the following grounds of appeal: -

"GROUNDS OF APPEAL

Based on facts and circumstances of the case and in law, the Appellant, respectfully craves leave to prefer an appeal under Sect. 253 of the I.T. Act, 1961 ('Act') against the order dated February 21, 2014, passed by the Deputy Commissioner of Income Tax, Circle 11(1), New Delhi under

Section 143(3) read with 144C of the Act pursuant to the directions issued by Hon'ble Dispute Resolution Panel -1, (DRP) Delhi on the following grounds:

1. General

- 1.1 That on facts and circumstances of the case and in law, the order passed by the Ld. AO pursuant to the directions issued by Hon'ble DRP is bad in law in as much as it has failed to appreciate the facts involved and law thereon.*
- 1.2 That on facts and circumstances of the case and in law, while passing the assessment order the Ld. AO has erred in computing the total income of the Appellant at INR 1,85,14,973 and therefore, the order of the Ld. AO is bad in law and needs to be annulled.*
- 1.3 That on facts and circumstances of the case and in law, the Ld. AO/TPO has erred in not following the directions of the DRP in toto.*

2. Economic Analysis

- 2.1 That the Ld. AO/TPO has erred on facts and circumstances of the case and in law, by not accepting the economic analysis undertaken by the Appellant in respect of its international transactions undertaken with its Associated Enterprises ('AE') and which determined the price of its transactions to be at an arm's length from an Indian Transfer Pricing perspective.*
- 2.2 That on the facts and circumstances of the case and in law, the Ld. AO/DRP have erred whilst rejecting the economic analysis of the Appellant as the same had been undertaken in accordance with law. The Appellant had determined the arm's length price in accordance with sub-sections (1) and (2) of section 92 (c) of the Act and maintained proper documentation under section 92(D) of the Act read with Rule 10 D of the Rules. The information/data so used and submitted during the course of transfer pricing/ assessment proceedings in the computation of arm's length price was from reliable internal as well as external sources.*
- 2.3 That on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred by intervening in the appellant's analysis, even though no circumstances exist as enumerated in Clauses (a) to (d) of section (3) of section 92C of the Act, which would 'warrant the Ld. TPO to disregard the analysis undertaken by the Appellant and undertake a fresh analysis.*
- 2.4 That on facts and circumstances of the case and in law, the Ld. AG/DRJP have erred in not appreciating that the data furnished by the Appellant was never held to be unreliable or incorrect in the transfer pricing/assessment proceeding.*

3. Wrong Computation of Operating Margin of Appellant

- 3.1 That on the facts and circumstances of the case and in law, the AO/DRP has grossly erred in computing the operating margins of the Appellant to (-)9.67% as against (-)9.13% as computed by the Appellant.
- 3.2 That on the facts and circumstances of the case and in law, the AO/DRP has grossly erred in computing the 'Advances Written off and 'Provision for Doubtful Advances' as Operating Expenses against the Appellant's computation of Advances Written off amounting to INR 43,39,568, Interest paid amounting to INR 8,368 and 'Provision for Doubtful Advances' amounting to INR 39,14,620 as non-operating.
- 3.3 That on the facts and circumstances of the case and in law, the Learned Assessing Officer/ DRP have erred in not providing reasons for rejecting the advances Written Off and Provision for Doubtful Advances as non-operating expenses
- 3.4 That on the facts and circumstances of the case and in law, the Ld. AO/DRP erred in not giving effect to Rule 10B Clause (3) of the Income Tax Rules, 1962 ('the Rules') in not allowing the Advances Written Off and Provision for Doubtful Advances as extra-ordinary non-operating expenses.

4. Unadjusted Margin of Comparable Companies incorrect

- 4.1 That on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in not adjudicating the grounds of the Appellant on unadjusted margins of the comparable companies to be 5.72% as against the 4.85% computed by the appellant.
- 4.2 That on the facts and circumstances of the case and in law, the Ld. TPO has grossly erred whilst computing the unadjusted margins of comparable companies to be 5.72% as against the 4.85% computed by the Appellant.
- 4.3 That on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in stating that no details is provided by the Appellant even though the appellant had undertaken capacity adjustment as part of the transfer pricing documentation (which contains all the necessary information) and also provided its audited financial statements to the Ld. TPO vide submission dated 04.01.2012.

5. Incorrect Computation of Working Capital Adjustment

- 5.1 That on the facts and circumstances of the case and in law, the Ld. AO has grossly erred in not taking cognizance of directions of the DRP on Working Capital Adjustment.

- 5.2 *That on the facts and circumstances of the case and in law, the Ld. AO/TPO has not upheld the directions of the DRP in toto as the, working capital margins of comparable companies has been computed at 1.80% against the 1.21% computed by the Appellant on the basis of OECD methodology and applying the SBI Prime Lending Rate(as on 30th June of the Relevant Financial Year) as the interest rate, based on the directions of DRP.*
6. *Capacity Adjustments in Computation of Operating Margins of the Comparable Companies*
- 6.1 *That on the facts and circumstances of the case and in law, the Ld. AO/DRP have grossly erred in rejecting the claim of the Appellant for comparable companies, though the Appellant had provided the complete documentation of the same as part of the Transfer pricing documentation submitted to the Ld. TPO on 04.01.2012 and the audited financial statements of the Appellant and the relevant data of comparable companies.*
- 6.2 *That on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in rejecting the claim of the Appellant for capacity adjustment while computing the operating margins of the comparable companies on the ground that the comparables were working at lower capacity.*
- 6.3 *That on the facts and circumstances of the case and in law,, the Ld. AO/DRP has erred in not adjudicating the specific ground of cost and inventory under the head tooling adjustment amounting to INR 49,306,943 despite a specific ground and detailed submission made to the DRP on 11.10.2013.*
7. *Data Unavailable at the time of Undertaking Transfer Pricing*
- 7.1 *That on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in non adjudicating on the ground of the Appellant on the prejudice caused to it due to use of the data by the TPO, not made available to the Appellant thereby violating the Principles of Natural justice.*
8. *Single Year Data Approach Vs, Multiple Year Data*
- 8.1 *That on the facts and circumstances of the case and in law, the Ld. AO/DRP have grossly erred in limiting the computation of margins of the comparable companies by using a single year data, which in the facts and circumstances of the case proves to be a misfit, as the OECD guidelines prescribes a multi year data approach for the appropriate application of the Transactional Net Margin Method.*
- 8.2 *That on the facts and circumstances of the case and in law, the Hon'ble DRP/AO have erred in limiting the scope of Rule 10B (4),*

which specifies that the most appropriate data to be used shall be the data relating to the financial year in which transaction is entered into and where relevant, the data relating to the two years preceding such Financial Year. The appellant in its submissions and through documents has demonstrated that the use of multiple year data has a definite bearing on the determination of the arm's length price.

- 8.3 *That on the facts and circumstances of the case and in law, the Ld. AO/DRP erred in relying on the judgment of Denso Haryana as the same does not relate to Transfer pricing/OCED guidelines and thus cannot be a precedent.*
9. *Adjustment on Proportionate Basis i.e. proportion of international transaction vis-a-vis cost base*
- 9.1 *That on the facts and circumstances of the case and in law, the Ld. AO/TPO has erred as the proportionate adjustment undertaken by the Ld. AO/TPO is Rs.18,514,973 against the calculation by the Appellant of Rs. 13,937,949, as the total cost to the Appellant is Rs.637,497,285 as against the wrongly computed cost of Rs.580,397,816.*
10. *Brought Forward Losses not adjusted vis-a-vis Adjusted Income proposed*
- 10.1 *That on the facts and circumstances of the case and in law, the Ld. AO in contravention to the Hon'ble DRP's Order has failed to adjust the Back Forward losses of INR176,778,175, the Appellant in accordance with the provisions of the Act*
11. *Proviso to Section 92C of the Income Tax Act not applied*
- 11.1 *That on the facts and circumstances of the case and in law, the DRP/AO has erred by not allowing the benefit of deduction of 5% under proviso to Section 92C(2) for purposes of computation of arm's length price.*
- 11.2 *That on the facts and circumstances of the case and in. law, the DRP/AO have failed to appreciate Section 92C(3) which states that the ALP shall be determined by the AO in accordance with sub section (1) & (2) of the Act and hence the TPO is mandatorily required to calculate Arm's length Price in accordance with Section 92C(1) & (2).*
12. *Penalty Proceedings*
- 12.1 *That on the facts and circumstances of the case and in law, the Ld. AO/DRP have erred in initiating the penalty proceedings under Section 271(1)(C) of the Act.*

12.2 That on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in holding that the Appellant has furnished inaccurate particulars and has concealed the particulars of its income.

13. Interest under 234 B of the Act

13.1 That on the facts and circumstances of the case and in law, the Ld. AO/DRP has erred in computing interest under Sections 234 B, 234 C and 234 D of the Act."

3. The brief facts of the case shows that the assessee is a company engaged in the business of manufacturing and trading of spark plugs, its accessories and wiper blades. It also trades in auto ignition systems and auto components. It also provides management services to its group companies and earned commission. It filed its return of income on 30.09.2009 declaring Nil income. As the assessee has entered into international transactions the Id Assessing Officer made a reference to Id Transfer Pricing Officer **to determine the arm's length price of the international transaction entered into by the assessee.** During the year assessee has entered into seven international transaction and out of them aggregated together five transactions of purchase and sales of goods as well as commission and benchmarked them applying Transactional Net Margin Method (TNMM) determining the profit level indicator of OP/OR. The assessee determined the average operating margin of itself @12.90% and considered the operating margin of the comparable at 2.07% after various adjustment submitted that the international transaction entered into by the **assessee are at arm's length. The other two transactions of the reimbursement received and paid were not benchmarked.** The assessee selected 8 comparables and used three year weighted average margins after undertaking capacity utilization adjustment for benchmarking.
4. The Id Transfer Pricing Officer took the single year margin of 6 comparable companies and determined arithmetic mean @4.85%. He further treated foreign exchange loss as operating expenses, denying capacity utilization and working capital adjustment passed an order u/s 92CA(3) on

06.12.2012 holding that against the margin of the comparable @4.85% the margin of the assessee is (-) 23.69%, hence, adjustment of Rs. 77410476/- was made. Consequently, the draft assessment order was passed by the Id Assessing Officer on 04.03.2013 determining the total income of the assessee at Rs. 81906960/-. The assessee filed its objection before the Id Dispute Resolution Panel that foreign exchange loss should be a non operating expenses. The other contentions of the assessee were partially accepted and Consequently, the Id Dispute Resolution Panel granted the relief to the assessee of Rs. 5.86 croeres on account of transfer pricing adjustment. Consequently, the Id Assessing Officer passed a final assessment order on 21.02.2014 determining the total income of the assessee at Rs. 18514973/- compared to returned income of Rs. Nil and the income computed as per draft assessment order of Rs. 81906960/- . Hence, assessee is in appeal before us.

5. Ground No. 1 of the appeal is general in nature and ground No. 2 of the appeal was with respect to economic analysis which were not pressed before us and stated to be general in nature and hence, same are dismissed.
6. Ground No. 3 is with respect to wrong computation of the operating margin of the assessee. The Id AR before the commencement submitted that a further rectification has been passed and TP adjustment is now restricted to Rs. 18574221/-. The Id AR made a limited submission that the Id Transfer Pricing Officer has computed the operating margins of assessee at (-) 9.67% vide order giving effect to DRP directions dated 17.2.2014 and, thereafter computed it as (-) 9.40% vide rectification order dated 31.10.2014 as against (-) 9.13% submitted by assessee. He submitted that reasons for difference is provision for doubtful debts has been taken as non-operating on both income and expense side in the Section 154 Order passed by the TPO. He further stated that the guidelines of safe harbor rules have not been followed by the TPO while computing the

margins of Assessee whereas the Id DRP had directed to follow the guidelines of safe harbor rules.

7. The Id Departmental Representative vehemently submitted that only dispute is with respect to provision for doubtful debts which are non operating income and therefore Id TPO has correctly adjusted it.
8. We have carefully considered the rival contentions. The claim of the assessee is that safe harbor rules needs to be followed. The Id DRP while **dealing the foreign exchange fluctuation losses in the assessee's own case** in para No. 7.2 has followed that safe harbor rules notified on 07.09.2013 should be followed. Therefore, we do not find any reason that if the Id AO did not object to this direction of the Id DRP, how the claim of the assessee with respect to following the similar rules can be objected to. Therefore, we set aside this ground back to the file of Id TPO to grant assessee the adjustment on account of provision for doubtful debts from the operating income and expenses both the sides as provided in safe harbor rules in Part II- DB of the Income Tax Rules, 1962. In the result ground No. 3 of the appeal of the assessee is allowed.
9. Ground No. 4 of the appeal is with respect to the error in computation of margin of the comparables. He submitted that margin computed by the assessee is 4.85% whereas the margin computed by the Id Transfer Pricing Officer is 5.76%. He submitted that reasons for difference in case of the three comparables which was pointed to the Id TPO but was not rectified.
10. The Id Departmental Representative submitted that matter may be sent back to the Id TPO to apply his mind and rectify the error if the same exists.
11. We have carefully considered the rival contentions. The assessee has submitted a chart with respect to the error in computation of the margin with respect to three comparable companies as under: -

Name of the comparable	Mistakes apparent from record which the TPO has failed to rectify
Liners India Limited	- Sundry expenses written back and excess provisions credited back of INR 213,263 have been considered as non-operating in nature
India Nippon Electricals Limited	- Bank Charges amounting to INR 16.08 lakhs has been erroneously considered as non-operating by the TPO
Lucas-TVS Limited	- Bill Discounting Charges and Cash Discount paid amounting to INR 256.52 lakhs has been erroneously considered as non-operating expense by the TPO

The Id TPO is directed to verify the margin with respect to this comparables on merits and if found to be erroneous same may be rectified. With respect to any difference of opinion he may grant opportunity of hearing to the assessee to explain and justify the error in the computation of margin. In the result ground No. 4 of the appeal of the assessee is allowed with above direction.

12. Ground No. 5 of the appeal is with respect to the computation of working capital adjustment in case of comparables. The Id AR submitted that the correct margin is 1.21% for working capital adjustment whereas the Id TPO **has taken @1.80%. He submitted that even after considering the TPO's consideration it would be 1.34%. He submitted that TPO has not considered the adjustment in case of Liners India Ltd.**
13. The Id Departmental Representative stated that the matter may be sent back to the TPO to recompute the margin and verify the claim of the assessee.
14. We have carefully considered the rival contentions. The Id AR has submitted that TPO has not considered working capital adjustment in case of Liner India Ltd which is adjusted margin as per assessee is (-) 3.82% wherein the TPO has taken 1.5%. It is stated that above difference is on account of computational error therefore, it would be in the interest of

justice if the Id Transfer Pricing Officer verifies the claim of the assessee and re-compute the same. In the result ground No. 5 of the appeal of the assessee is allowed with above direction.

15. Ground No. 6,7 and to 9 are not pressed. Further, admittedly ground No. 8 is decided against the assessee and therefore, same are dismissed.
16. Ground No. 10 of the appeal is with respect to the claim of the assessee for adjustment of losses of Rs. 176778175/-. The Id DRP has given direction to the Id Assessing Officer to consider the claim of the assessee of the adjustment of the brought forward losses and set off in accordance with the provision of the Act. The grievance of the assessee is that same is pending.
17. The Id DR readily agreed that same may be verified by the Id TPO/AO and shall be allowed.
18. We have carefully considered the rival contentions. We direct the Id Transfer Pricing Officer/ Id AO to allow the claim of brought forward losses if found in accordance with the law. Accordingly, ground No. 10 of the appeal is allowed.
19. Ground No. 11 to 13 were not agitated before us and hence, same are dismissed.
20. In the result appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 14/05/2018.

-Sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 14/05/2018
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)

5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

TAXPUNDIT.ORG