IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "I (2)", NEW DELHI]

BEFORE MS. SUCHITRA KAMBLE, JUDICIAL MEMBER
And
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 6535/Del/2017
Assessment Year : 2013-14

M/s Oriflame India Pvt. Ltd., Ground Floor, Corporate One, Plot No. 5, NHCC, Jasola, New Delhi - 110 076. **PAN : AAACO0256B**	Vs	Additional Commissioner of Income Tax, Special Range : 7, New Delhi.
(APPELLANT)		**(RESPONDENT)**

Revenue by :	Shri G. K. Dhall [CIT] – D. R.;
Assessee by :	Shri Himanshu Sinha, Adv.;

Date of hearing:	**04/03/2020**
Date of Pronouncement:	**01/06/2020**

O R D E R

PER PRASHANT MAHARISHI, AM:

01 This appeal is filed by the assessee against the order of THE ADDITIONAL COMMISSIONER OF INCOME TAX, SPECIAL RANGE – SEVEN, NEW DELHI [The Ld AO] passed on 23/9/2017 under section 143 (3) read with section 92CA (3) read with section 144C (13) of The Income Tax Act [The Act] for Assessment Year [AY] 2013 – 14 determining the total income of the assessee at ₹ 981607220/- incorporating the adjustment on

account of the arm's length price [ALP] of the international transaction of Rs 66,55,27,960/- against the returned income filed by the assessee at Rs 31,60,79,260/–.

02 Assessee is part of Oriflame group of companies comprising of Oriflame cosmetics SA [as the parent company] based in Luxembourg holding 100 % equity in Oriflame investments Ltd,[Mauritian company] which holds almost all the shares of the appellant company.

03 Assessee is engaged in trading of beauty products . It caters to the middle as well as the premium end market and currently has a presence in, cosmetics, skincare products, toiletries and Fragrances. It imports finished products as a part of its marketing strategy and to complete its product range. It imports products through Oriflame trading Ltd [the global trading Co of the group] upto October 2002 and subsequently through Oriflame cosmetics SA .

04 The assessee filed its return of income on 30 November 2013 declaring an income of ₹ 31,60,79,260/-. As the assessee has entered into an international transaction the reference was made to the learned Transfer Pricing Officer [ld TPO] to determine the arm's length price under section 92CA (3) of the act. The order of the ld TPO was received on 28/10/2016 wherein the transfer pricing adjustment of Rs 66,55,27,960/- was proposed. Consequently the draft assessment order was passed on 30/11/2016 wherein the income of the assessee was computed at ₹ 98,16,07,220/–. Assessee filed objection before the Dispute Resolution Panel – 2, New Delhi[The Ld DRP] . The learned DRP passed directions on 22/8/2017 granting no relief in the transfer

pricing adjustment proposed by the learned TPO. Thus the assessment order under section 143 (three)/92CA (three)/144C (13) of the income tax act, 1961 was passed determining the total income of the assessee at ₹ 9 81607 to 20/–. This order is under challenge before us.

05 The assessee has raised following grounds of appeal:-

1. That on the facts and in the circumstances of the case and in law, the order passed by the Ld. Assessing Officer ("AO") is bad in law and void ab-initio.

2. That on facts and circumstances of the case and in law, the Ld. Dispute Resolution Panel ("DRP") erred in upholding the addition of INR 665,527,960 made by the Ld. AO/Transfer Pricing Officer ("TPO") to the returned income of the Appellant by recomputing, the arm's length price of the international transactions under section 92 of the Income Tax Act, 1961 ("Act").

3. That on the facts and circumstances of the case and in law, the Ld. DRP erred in upholding the validity of the reference made by the Ld. AO to the Ld. TPO and without recording any reasons to show that it was necessary and expedient to do so and without affording any opportunity to the Appellant in this regard.

4. That the Ld. DRP erred on facts and in law in upholding the adjustment made by the Ld. AO/TPO to the arm's length price of the Appellant's international transactions with its associated enterprises by -

4.1 Considering direct selling companies to be the only appropriate comparables and in doing so arbitrary rejecting the comparables selected by the Appellant, which were selected by the Appellant on the basis of a valid scientific search process and based on the criteria of functional and product comparability.

4.2 Selecting Modicare Ltd as a single comparable company for the arm's length analysis even though this company was not comparable on a standalone basis to the appellant in terms of functions, assets and risks assumed and its product profile and by disregarding that this company was a persistent loss making company.

4.3 Disregarding the Hon'ble bench's decision in Appellant's own case for AY 2009-10 to AY 2011-12 by not considering the categorical finding of the Hon'ble Tribunal that Modicare Ltd. should not have been taken as a standalone comparable.

4.4 Disregarding the Hon'ble bench's decision in Appellant's own case for AY 2009-10 to AY 2011-12 by not considering the economic adjustments to account for differences in the accounting of certain significant expense items like incentive, high AMP to sales ratio, etc between Modicare Ltd and the Appellant.

4.5 Failing to appreciate that the Arm's Length Price of Appellant's international transactions of purchase of finished goods had been accepted by the customs department as per the Special Valuation Board Order.

5. The Ld. DRP erred in facts and in law in not considering the Transaction Net Margin Method (TNMM) analysis as conducted by the Appellant.

6.Without prejudice, that on the facts and circumstances of the case and in law, the Ld DRP/AO/TPO erred in incorrectly computing the gross margins of Modicare Ltd. and the Appellant.

7. The Ld. DRP/AO/TPO has erred in considering the unaudited data requisitioned and consequently obtained by taking recourse to the provisions of Section 133(6), irrespective of the availability of such information in the

public domain and thereby erred in rejecting Altos Enterprises Limited.

8.The Ld. DRP erred in disregarding the multiple year data selected by the Appellant in the TP Documentation and in selecting the current year (i.e. financial year 2012-13) data for comparability despite the fact that at the time of comparison done by the Appellant, the complete data for financial year 2012-13 was not available within the public domain.

9. The Ld. DRP erred in facts and in law in upholding the inconsistent approach of the Ld. AO/TPO in rejecting the transfer pricing methodology for this financial year when the same was accepted in the prior years despite there being no change in facts and circumstances over the two years (i.e. financial year 2007-08 and 2006-07).

10. That on the facts and circumstances of the case and in law, the Ld. DRP erred in making a transfer pricing addition on the total value of purchases instead of proportionate adjustment restricted to the value of international transaction under consideration and thereby disregarding Hon'ble bench's decision in Appellants own case for AY 2012-13.

11. That on facts and circumstances of the case and in law, the Ld. DRP erred in disregarding economic adjustment for the difference in working capital position of the Appellant vis-a-vis comparables.

12. That on the facts and in the circumstances of the case and in law, the Ld. DRP erred in upholding the levy of interest under section 234B and 234C of the Act.

06 The only adjustment that as made by the learned TPO with respect to the local trading segment of the cosmetic products. The learned TPO noted that assessee has bifurcated its transactions in three segments namely (i) manufacturing

segment, (ii) local trading segment and (iii) export trading segment. For benchmarking transactions related to renting segment of the cosmetic products assessee has used the Transactional Net Margin Method [TNMM] as the most appropriate method [MAM] choosing the profit level indicator [PLI] of OP /OI, conducting a search on the PROWESS and capitaline database and arrived at the set of three comparables. The average margin of this comparables is 4.71% by using multiple year data, compared its own margin of 4.13% and stated that its international transaction of that segment are at arm's length.

07 The learned transfer pricing rejected TNMM method adopted by assessee and proceeded to adopt Resale price Method. He rejected all the comparables of the assessee applying the filter of different business model, turnover less than ₹ 1 crore trading sales/total sales ratio less than 50%, duplication of the companies, negative company 25% related party transaction filter and different financial year. Thereafter, he selected the single comparable namely Modicare Limited. He computed the margin of that company by adopting PLI of gross profit/sales at 71.34 percentage, computed the margin of the assessee at 42.54 percentage and thereafter putrid the shortfall of rupees 665527960/–. This adjustment is also upheld by the learned dispute resolution panel and therefore incorporated by the AO in its final order.

08 The learned authorised representative submitted that the above approach of the learned TPO is based on prior year order of the learned TPO and dispute resolution panel wherein similar

adjustment have been proposed on the basis of single comparable company and other facts and circumstances are similar. He submitted that the coordinate bench in its own case for assessment year 2008 – 9 to Ay 2012-13 has decided this issue as per order dated 15 April 2019. Therefore, the issue is squarely covered in favour of the assessee. He referred to the order of the coordinate bench wherein it has been held that due to non-comparable product profile and other differences and lack of data of various factors, reasonably accurate adjustment cannot be made. As was directed by the honourable High Court, it held that Modicare Ltd cannot be taken as a comparable company under resale price method. Therefore, he submitted that the above comparable have been rejected by the coordinate bench in assessee's own case in earlier years. He further referred to the order of the coordinate bench and submitted that the TNMM is accepted as the most appropriate method and in that year coordinate bench directed the learned TPO to apply TNMM on the comparable selected by the assessee with suitable working capital adjustment. He therefore submitted that issue is squarely covered in favour of the assessee. He further submitted that the dispute resolution panel in subsequent year in assessment year 14- 15 has also rejected the above comparable and has accepted the transfer pricing approach and methodology provided by the appellant in the transfer pricing documentation. For this year also he submitted that above comparable has a negative net worth of Rs 4 6621741/–. He referred to the annual report of the comparable. Therefore he submitted that as per the filter of the learned TPO also the above company has a negative net worth and therefore it should have been rejected. In view of this, he submitted that issue squarely covered in favour of the assessee.

09 The learned and departmental representative relied upon the orders of the AO/TPO/DRP.

10 We have carefully considered rival contention and perused the orders of the lower authority as well as the order of the coordinate bench in assessee's own case for assessment year 2009 – 10 to assessment year 2012 – 13. This issue stands decided in assessee's own case in **2019-TII-209-ITAT-DEL-TP** for assessment year 2009 – 10, 2010 – 11, 2011 – 12 and 2012 – 13, on identical facts and circumstances where the coordinate bench as per order dated 15 April 2019 has held as under:-

> "16. We have heard the rival submissions and also perused the relevant findings given in the impugned orders as well as material referred to before us at the time of hearing. As stated above, in the first round of proceedings, Tribunal though had enlisted various factors and distinguishing features to hold various differences between the Modicare Ltd. and assessee, however remanded the matter back to the TPO to examine the comparability adjustments between the Assessee Company and Modi Care Ltd. The said order of the Tribunal has been set aside by the Hon'ble High Court, wherein Hon'ble High Court, first of all agreed with the contention of the assessee that looking to such a difference, Modicare Ltd. cannot be that straightaway taken as a comparable company, what is required to be seen is: -
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> - Firstly, whether it would be appropriate to include Modicare Ltd. having regard to the availability of data with respect to the different product segments; and

- Secondly, the functional differences with respect to its marketing strategy, i.e., discount, transportation cost, insurance and performing the warranty functions;

Their Lordships further directed that the Tribunal should reexamine, to what extent adjustment can be reasonably made having regard to the available data in relation to trading comparable offered for ALP determination for all the relevant years by the assessee. Further, the Tribunal was directed to consider the feasibility having regard to available data for all the concerned years for making appropriate adjustment. Another very important observation made by the Hon'ble Court was that it was open to the assessee to urge that TNMM can be taken as most appropriate method instead of RPM and there would be no enlarging of comparable already selected by the assessee.

17. It was in this background, we had required the Ld. TPO to submit a remand report, whether relevant data with regard to various segment of Modicare Ltd. is available or not; and to what extent adjustment can be made. The differences highlighted by the assessee was directed to be examined by the TPO. Further, it was also directed that the comparables given by the assessee should also be examined under TNMM for which relevant data would be provided by the assessee and same should be verified by the TPO. Now as is evident from the content of the remand report, the Ld. TPO has admitted that, Modicare Ltd. has not disclosed any business segment for its various products and from this she has inferred that the company does not differentiate its products into separate reportable segments and accordingly, different segment cannot to be considered. As per the Ld. TPO, since Modi Care Ltd. is also into direct selling model as that of the assessee, therefore, it is a most appropriate comparable. She has also referred to marketing

and selling function of the assessee-company and also that of Modicare Ltd. regarding their sale and marketing pattern and concluded that Modicare Ltd. is an appropriate comparable as it has direct selling like assessee and hence majority of revenue is from the sale of products similar to that of assessee. Apart from that, she has rejected all the comparables shown by the assessee on the ground that they were dealing in different kind of product segments.

18. First of all, the entire exercise of remand proceedings was circumscribed by the direction of the Hon’ble High Court as there was clear-cut direction that the appropriateness of including the Modicare Ltd. as comparable has to be seen only when there is availability of data with respect to different product segment and the functional difference with respect to its marketing strategy. If it is an admitted fact that no data of Modi Care Ltd. is available with regard to different product segment, then at the very threshold, it would very difficult to include Modicare Ltd. as a comparable company; and if data itself is not available, then adjustment also cannot be made. Simply because Modicare Ltd. is also involved in direct selling, cannot be taken as a good comparable, especially in the light of the observation and finding of the Hon'ble High Court as reproduced above. Apart from that, we agree with the contention of the learned counsel that, Modi Care Ltd. had a huge diversified product portfolio ranging from personal care, agriculture, Tea, Jewellery, Healthcare, cosmetics, etc. which had different profitability depending upon market factors. Different product items would involve different level of assets, risks and market which may affect gross margins. Though it is not always necessary under resale price analysis that each product line distributed should be examined, but there should be broadly similar products so that gross compensation of the functions performed, that is, marketing and

selling functions can be analysed. If reliable data for the various product and marketing strategy is not available, then accurate comparability adjustments would be very difficult to carry out. Another distinctive feature, which we have noted is that, Oriflamme India records the sale, net of discounts/ incentives paid to its agent/consultant and that is the reason why the gross profit margin is lower. On the other hand, in the case of Modicare Ltd. discount given to the consultants/agents has been categorized as 'incentives' which has been taken below the line in the Profit & Loss account treating to be a part of operating expenses. Because of the difference in accounting treatment, there is a gap between gross profit margin and net profit margin disclosed by the Modicare Ltd., which can be seen from the annual account that the gross profit margin of Modicare Ltd has been shown at 76.47%, whereas the net profit margin is at only 2.25%. Thus, there is substantial variance in the gross and net profit margin levels, which indicates that Modicare Ltd. is incurring heavy operating expenses and also substantiates heavy functions at the operating level. Further, Modicare Ltd. has significant AMP expenses of 7.32% which in the case of the assessee is only 0.94%. If a distributor is incurring substantial AMP expenses then it cannot be compared with routine distributor under RPM as it tantamount to value addition. This also goes to show Modicare Ltd. has different functions as compared to the assessee. There is also difference in the case of goods sold ratio and value-added expenses which is apparent from the fact that in case of Modi Care Ltd. the cost of goods sold ranges from 22% to 28% of its total operating cost and value-added expenses/operating expenses are more than 70%. Modicare Ltd. has also recorded franchisee expenses and hence it cannot be inferred wholly as a direct seller. In view of such differences, it would be very difficult to carry out adjustment especially with regard to the product portfolio, functional portfolio, etc. Adjustment if at all can be made would be to some extent of differential accounting treatment for incentive/ discount. Even the TPO in her remand report has unable to demonstrate incomparable product profile of Modi Care Ltd. and assessee and how the comparability adjustment is possible on account of such huge difference in product profile. Further, the service fee earned by the assessee is on account of renewal fees and handling fees received from the individual consultants, engaged in distribution of assessee's product and directly related to assessee's business. Whereas, the service fee earned by Modi Care Ltd. is on account of annual maintenance contract (AMC). This factor also vitiates the comparability analysis.

19. We are thus in tandem with the contention raised by the learned counsel that due to non-comparable product profile and other differences and lack of data for various factors, reasonably accurate adjustment cannot be made. as was directed by the Hon'ble High Court. Hence Modi Care Ltd. cannot be taken as a comparable company under RPM.

20. Once, Modi Care Ltd. which is the sole comparable is removed, then as per the observation of the Hon'ble High Court, TNMM has to be adopted as the most appropriate method and that too be without enlarging the comparables, i.e., the comparables selected by the assessee has to be examined under TNNM. The TPO who was required to examine the comparables selected by the assessee under TNMM, has instead stated that TNNM cannot be applied under this case, because it requires a high degree of similarity of functions and none of the comparables are direct seller of the product. In our opinion, such an approach of the ld. TPO however cannot be upheld, because the Hon'ble

> High Court has directed that if reliable data for Modicare is not available for various factors as highlighted by their Lordships then it cannot be taken as comparable under RPM and the only TNMM has to be analysed. One of the strengths of TNNM is that net profit indicators are less affected by transactional differences and net profit indicators are more tolerant to some functional differences between the controlled and uncontrolled transaction than gross margin profits. The differences in the functions performed between the enterprises are often reflected in variations in operating expenses. Though this may lead to wide range of gross profit margin but still broadly similar levels of net operating profit indicators. Under the TNMM standard of comparability is relaxed relative to other methods with only broadly similarity of functions required. Thus, in our opinion as observed by the Hon'ble High Court, TNMM can be adopted as most appropriate method. Accordingly, we direct the TPO to apply TNMM on the comparable selected by the assessee with suitable working capital adjustment."

11 As there is no change in the facts and circumstances of the case, the learned dispute resolution panel in assessee's own case for assessment year 14-15 has also rejected Modi care Limited as comparable and accepted the transactional net margin method as the most appropriate method, we respectfully following the decision of the coordinate bench direct learned TPO to adopt transactional net margin method as the most appropriate method and also not to take Modicare Ltd as the comparable. Thus, we have held that transactional net margin method is the most appropriate method, the TPO is directed to examine the international transactions entered into by the assessee applying that method and compare the margin of the assessee with the

comparable companies selected by the assessee. In the result ground number 4 to 11 of the appeal of the assessee are allowed.

12 Ground number 1-3, 12 and 13 are general in nature therefore they are dismissed.

13 In the result appeal of the assessee is partly allowed.

Order pronounced in the open court on **01/06/2020.**

-Sd/-	**-Sd/-**
(SUCHITRA KAMBLE)	**(PRASHANT MAHARISHI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

MEHTA

Date: **01/06/2020**

Copy forwarded to:

1. Appellant;
2. Respondent;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI