IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'B' CHENNAI

BEFORE Dr. O.K. NARAYANAN, VICE-PRESIDENT
AND SHRI HARI OM MARATHA, JUDICIAL MEMBER

I.T.A.No. 2099/Mds/2010
Assessment year : 2006-07

M/s. Coastal Energy Pvt. Ltd. 5, Buhari Buildings, Moores Road, Thousand Lights, Chennai – 600 006.	Vs.	The Assistant Commissioner of Income-tax, Company Circle-I(3), Chennai – 34.
PAN – AAACC 4160 A (Appellant)		(Respondent)

Appellant by : Shri Vikram Vijayaraghvan, Advocate
Respondent by : Shri P.B.Sekaran, CIT-DR

O R D E R

PER Dr. O.K. NARAYANAN, VICE-PRESIDENT

This appeal is filed by the assessee. The relevant assessment year is 2006-07. This appeal arises out of the assessment in which transfer pricing adjustment has been made by the assessing authority. The said adjustment has been made in the light of the order of the Transfer Pricing Officer (TPO)

passed under sec.92CA(3) on 28.10.2009 and also the order of the Dispute Resolution Panel (DRP) at Chennai dated 23.9.2010.

2. The assessee-company is engaged in the import of coal and supplying the same to various consumers in India like Tata Power, GNFC, TCP Ltd., Malabar Cements Ltd., Mysore Paper Mills, Madras Cements etc. The assessee-company makes import of coal from its Associate Enterprise (AE). In effect, this is a Transfer Pricing Appeal. M/s. Coal & Oil LLC, Dubai is the AE which supplies coal to the assessee for importing the same to India.

3. The Assessing Officer referred the question of determining the Arm's-Length Price (ALP) to the TPO on the basis of this relationship and the quantum of transactions that had taken place between the assessee-company and its AE. On going through the details of the case, the TPO found an instance of import made by the assessee for a price higher than the price quoted by another importer for the same day. She observed that the assessee had imported 1000 MT of coal from its AE on 26.5.2005. The purchase price was 46.51 USD per MT. On the same day another company, M/s. Adam & Coal Resources (P)

Ltd. had imported 1440 MT of coal. The price quoted by M/s. Adam & Coal Resources (P) Ltd. was 43 USD per MT. The TPO found that the difference in the price between the consignment of the assessee-company and M/s. Adam & Coal Resources (P) Ltd. is substantial which has crossed the tolerance limit of plus or minus 5%. In view of the above comparative values, the TPO came to the conclusion that the assessee has overstated its purchase price and thereby made it necessary to make adjustment in the purchase price of coal for the purpose of assessment. On the basis of the above price variation, the TPO computed the adjustment value at ₹ 3,49,14,706/- and proposed an addition to the income of the assessee.

4. The issue was thereafter brought before the DRP at Chennai. The assessee had relied on a decision of the I.T.A.T., Mumbai Bench 'B' in the case of UCB India (P) Ltd. v. ACIT (121 ITD 131) in which case, the Tribunal had upheld the application of comparable controlled transaction. For the purpose of evaluating the ALP, after considering the facts of the above case and the present case, the DRP came to the conclusion that the decision of the I.T.A.T., Mumbai Bench is limited to the facts of that case and

cannot be treated as a precedent to be followed. The DRP after examining the facts of the case held that the meaning of the CUP method itself is the comparison of variables in an uncontrolled price factors, and particularly, in the present case, comparison of uncontrolled prices, is the most appropriate method. The DRP accordingly, upheld that proposal of the TPO. Finally, the proposal was converted into adjustment by the assessing authority resulting in an addition of ₹ 3,49,14,706/-. The assessee is aggrieved and therefore, the appeal before the Tribunal.

5. We heard Shri Vikram Vijayaraghavan, Advocate appearing for the assesse-company and Shri P.B.Sekaran, the learned Commissioner of Income-tax appearing for the Revenue. As always stated, facts speak for themselves. The TPO has identified a typical transaction fit for comparison in uncontrolled market conditions. On 26.5.2005, the assessee-company had imported 1000 MT of coal from its AE. The purchase rate was 46.51 USD per MT. On the very same day, 26.5.2005 another company, M/s. Adam & Coal Resources (P) Ltd. also had imported coal. A consignment of 1440 MT was offloaded at the rate of 43 USD per MT. There is a striking difference in the price

quoted by the assessee and M/s. Adam & Coal Resources (P) Ltd. As rightly pointed out by the DRP, this difference exceeds even the tolerance limit.

6. The next question to be considered is whether this price variation noticed by the TPO should be taken as the basis for making adjustment in the transfer pricing. The grievance of the assessee is that the comparable price has been obtained by the TPO from the customs authorities and the valuation of the customs authorities need not necessarily be realistic as that department is more interested in collecting import duties. We should state without fear of contradiction that the customs authorities are assigning values to the imported goods on the basis of scientifically formulated methods and they are responsible for making a fair assessment value of the imported goods. The valuation made by the customs authorities is not an arbitrary exercise. But on the other hand, it depends upon large volume of international data classified according to internationally accepted protocol. Therefore, it is not possible to say that the credibility of the price rate furnished by customs authorities needs to be discounted.

7. It is always possible for an assessee to establish its case for a different price other than the customs price provided the assessee has produced acceptable materials to support its proposition. In the present case, except its own internationally generated price, the assessee has not furnished any comparable data. Therefore, the assessee has no locus standi to question the credibility of the customs data relied upon by the TPO.

8. The Advocate appearing for the assessee company has argued at length on the possibility of differential price for different consignments depending upon the quality of goods imported by each assessee. He argued that the coal is usually priced on the basis of HCV (High Calorific Value), MCV (Medium Calorific Value) and LCV (Low Calorific Value). It is on the basis of the coal value that the pricing of coal is determined in the international market. This aspect has not been looked into by the TPO. Therefore, there is no rule that the coal imported by the assessee should be at the same price for which another assessee might have imported. When we examined this argument, we found that the assessee has not furnished any details on the

calorific value of the coal imported by the assessee-company from its AE. The statement made by the Advocate is acceptable as a general proposition in comparing the prices of different import consignments. But that general proposition can be applied in a particular case only if relevant materials are available on record. In the present case, the assessee has not furnished any information on the calorific value of the coal imported by the assessee or on any other distinguishing features that the coal imported by the assessee company had advantage over the coal imported by M/s. Adam & Coal Resources (P) Ltd. This contention of the assessee cannot be accepted.

9. Another important issue is regarding adaptability of CUP method by the TPO. It is a method of comparing uncontrolled prices. We agree with the DRP that the essence of CUP method is a free comparison of variables in a free market condition. Controlled market condition is not as such recognized by the statute formulated for transfer pricing. But as a practical manifestation, a comparison of controlled prices may become necessary. It of course, depends upon the facts and circumstances of a particular case. In the present case, we do not find any special reason to rely on a comparison based on

controlled prices. The CUP method as construed in the statute has to be applied in the present case. When it is so applied, we find that the import of coal made by the assessee from its AE has been over-invoiced. Therefore, the authorities below are justified in making appropriate adjustment in the transfer pricing.

10. Once the adjustment is justified, the next question is the quantification of the adjustment. In the present case, the TPO has worked out the adjustment amount exactly on the basis of price variation between the companies. This is the most simple and acceptable method. It has to be upheld.

11. Therefore, in the facts and circumstances of the case, we find that the assessing authority has rightly determined the transfer pricing adjustment to ₹ 3,49,14,706/- and made that addition to the income of the assessee company.

12. In result, this appeal filed by the assessee is dismissed.

Order pronounced on Wednesday, the 13th day of July, 2011 at Chennai.

Sd/-	Sd/-
(HARI OM MARATHA)	(Dr.O.K.NARAYANAN)
Judicial Member	Vice-President

Chennai,

Dated the 13th July, 2011

mpo*

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