IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. Nos. 263 & 264/Kol/2020
Assessment Years : 2014-15 & 2015-16

DCIT, Circle-6(1), Kolkata	Vs.	M/s Deepak Industries Ltd. (PAN: AAACD 8767 J)
Appellant		Respondent

C.O. Nos. 04 & 05/Kol/2021
(Arising out of I.T.A. Nos. 263 & 264/Kol/2020)
Assessment Years : 2014-15 & 2015-16

M/s Deepak Industries Ltd. (PAN: AAACD 8767 J)	Vs.	DCIT, Circle-6(1), Kolkata
Cross-objector		Respondent

Date of Hearing	09.05.2022
Date of Pronouncement	23.06.2022
For the Appellant	Shri Siddharth Jhajharia, FCA Shri Sujoy Sen, Advocate
For the Respondent	Shri Amol Kamat, CIT Shri Tushar Dhawal Singh, CITDR

ORDER

Per Shri Rajesh Kumar, AM:

These are the two appeals preferred by the revenue and two cross-objections filed by the assessee against the orders of the Commissioner of Income Tax(Appeals)-22, Kolkata [hereinafter referred to as 'CIT(A)'] both even dated 31.10.2019 for the assessment years 2014-15 & 2015-16 respectively.

2. Though the Registry has pointed out that the appeal is time barred, however, in view of the decision of the Hon'ble Supreme Court in the case of Miscellaneous

Application No. 665 of 2021 in SMW(C) No. 3 of 2020, the period of filing appeal during the COVID-19 pandemic is to be excluded for the purpose of counting the limitation period. In view of this, the appeal is treated as filed within the limitation period.

3. First we will take revenue's appeal in **ITA No. 263/Kol/2020 and assessee's CO No. 04/Kol/2021 for AY 2014-15**. The grounds taken by the revenue are reproduced as under:

> *1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the arm's length price adjustment of Rs. 12,06,40,000/- made by the AO/TPO on account of income earned and purchase of raw materials by the eligible unit from its non-eligible unit of the assessee.*
>
> *2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in considering Cost Plus Method (CPM) as the most appropriate method ignoring the fact that CPM method is preferred over the other methods, where the comparable controlled and uncontrolled transactions follows same accounting norm in respect of recognition of income and cost are identifiable.*
>
> *3. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has failed to bring on record any cogent reason and rationale for accepting CPM method as the most appropriate method in assessee's own case why TNMM which considers functionally at a broader level is not applicable for benchmarking.*
>
> *4. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in accepting that the valuation of materials transferred are done in accordance with Excise Valuation Rules and hence to be at arm's length.*
>
> *5. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in allowing the claim of balance additional depreciation of Rs. 60,60,115/- u/s 32(1)(iia).*
>
> *6. Whether on the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the addition made by disallowing the foreign currency loss of Rs. 1,65,65,143/-.*
>
> *7. That the appellant craves for leave to add, delete and modify any of the grounds of appeal before or at the time of hearing.*

4. The issue raised in ground nos. 1 to 4 is common and is against the order of Ld. CIT(A) deleting the TP adjustment of Rs. 12,06,40,000/- as made by AO/TPO on account of specified domestic transactions between the eligible unit and non-eligible unit of the assessee. The revenue has also challenged the order of Ld. CIT(A) considering the Cost Plus Method (CPM) as most appropriate method without any cogent reasons whereas the AO/TPO treated the TNMM as the most functional method applicable for benchmarking.

5. Facts in brief are that the assessee has three manufacturing units at Kolkata, Faridabad and Rudrapur. The unit at Rudrapur was set up in FY 2007-08 relevant to AY 2008-09 and is eligible for deduction u/s 80IC of the Act. And this being the 7th assessment year for the purpose of deduction u/s 80IC of the Act. The assessee has been claimed deduction u/s 80IC for AY 2008-09 which has been accepted by the revenue in the scrutiny assessment which culminated u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the Act). The assessee had specified domestic transactions between two units during the year and accordingly the AO referred the matter to TPO after obtaining due approval from PCIT for determining the arms length price(hereinafter called as ALP) of the said specified domestic transactions. The TPO passed an order u/s 92CA(3) of the Act dated 04.10.2017 in relation to specified domestic transactions proposing arm's length price adjustment of Rs. 12,06,40,000/- by rejecting Cost Plus Method followed by the assessee and adopting TNMM as MAM(Most Appropriate Method) for benchmarking the said transactions between the eligible unit at Rudrapur and non-eligible unit at Faridabad. The TPO compared the net profit margin of the two units which were 35.17% for Rudrapur Unit and 4.30% for Faridabad unit and calculated the arm's length adjustment at 30.87% and applied the same on specified transactions thereby are proposing TP adjustments as stated above. The calculation of TPO is extracted below:

CALCULATION OF DOWNWARD ADJUSTMENT IN RESPECT OF PURCHASE

PARTICULARS	REFERENCE	AMOUNT (IN LACS)
Total Sales (OR)	A	5,914.76
Total Operating Cost	B	3,834.06
Operating Profit (OP)	C=A-B	2,080.70
OP/OR	D=C/A	35.18%
Arm's Length OP/OR	E	4.31%
Arm's Length Operating Profit	F=AXE	254.72
Excess Profit earned	G=C-F	1,825.98
Total Value of Related Purchase	H	2,277.21
% of Related Party Purchase over Total Cost	I=H/B	59.39%
Proportionate Adjustment	**J=GXI**	**1,084.53**

CALCULATION OF DOWNWARD ADJUSTMENT IN RESPECT OF INCOME

PARTICULARS	REFERENCE	AMOUNT (IN LACS)
Total Sales (OR)	A	5,914.76
Total Operating Cost	B	3,834.06
Operating Profit (OP)	C=A-B	2,080.70
OP/OE	D=C/A	54.27%
Arm's Length OP/OC	E	4.50%
Arm's Length Operating Profit	F=BXE	172.54
Excess Profit earned	G=C-F	1908.16
Total Value of Related Income	H	377.78

The assessee followed the cost plus method (CPM) to bench mark the specified domestic transactions and accordingly filed the transfer pricing documents before the TPO showing that the assessee has followed the cost plus method to determine the arm's length price of the transactions between Rudrapur Unit and Faridabad Unit the auditor of the assessee in Form 3CEB has wrongly stated that TNMM method was considered to bench mark the said transactions between Rudrapur unit and Faridabad unit. However, the assessee did not claim any deduction u/s 80IC of the Act in view of the losses during the year. The assessee is into manufacturing of gear boxes and gears at its units at Kolkata, Faridabad and Rudrapur which have been fully discussed in TPSR and in the TPO order at page no. 3. Faridabad unit manufactures gears for tractors and bigger trucks and even plant and machinery being the very old whereas Rudrapur unit manufactures 3rd & 4th gears for small trucks produced by Tata Motors and is solely a contract manufacturer for Tata Motors. Rudrapur unit procures semi finished goods i.e shafts/blanks from Faridabad unit and after further processing , it produces 3rd & 4th gears for small trucks of Tata Motors Ltd. During the year material was procured from Faridabad unit by Rudrapur unit amounted to Rs. 22,10,00,000/- (Rs. 20.26 cr. + Rs. 1.84 cr.). Besides Rudrapur unit also does some job work for Faridabad which is priced at Rs. 4.11 cr. (Rs. 3.70 cr +Rs. 0.34 cr). Thus, the assessee followed cost plus method (CPM) for which direct and indirect cost were considered based on costing records CAS-4 and gross profit margin at 10% was added thereto towards margin.

6. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee on this issue by upholding the CPM as most appropriate method by observing and holding as under:

> *"1. 1 hove carefully considered the submissions of the Ld. AR of the appellant In the backdrop of the transfer pricing order passed by the AO u/s 92CA(3)of the Act. The documents and details furnished by the appellant before the Id. TPO has also been carefully perused. In order to adjudicate the issue Involved. It is first necessary to appreciate the background facts Involved In the present case. The appellant company Is engaged in the business of gears, shafts, gearboxes and couplings having manufacturing units at Kolkata, Faridabad and Rudrapur. From the Id. TPO's order, it is noted that the units at Faridabad and Rudrapur are engaged in manufacture of automobile gears. The Unit at Rudrapur is located In a industrially backward district as notified In Section 80IC of the Act and therefore the appellant has claimed deduction in respect of the profits derived by such eligible unit. During the relevant financial year, the eligible unit at Rudrapur had inter-unit transfers of raw materials and semi-finished goods with its non-eligible unit at Faridabad. Since these transactions fell within the ambit of Section 80IA(8) & (10), the appellant obtained o certificate In Form 3CEB from a Chartered Accountant who certified that the transactions were conducted at fair market value / ALP. In the. Form 3CEB the Chartered Accountant had certified that the transactions were found to be at arm's length under the TNMM Method. Before the TPO however, the appellant claimed that the most appropriate method to benchmark the inter-unit transactions was the Cost Plus Method which was also set out In the Transfer Pricing Study Report ('TPSR'). To buttress Its contention, the appellant company also .furnished a certificate from the cost accountant, The Id. TPO however in his show cause observed that the methodology followed by the appellant was devoid of any logic and held that Internal TNMM was the most appropriate method In the given facts of the present case. According to him, since the units at Faridabad and Rudrapur were involved In the same line of business, Its profitability ought to be comparable. The Id. TPO computed the OP/OR and OP/TC of the Faridabad Unit at 4.31% & 4.50% and round that the OP/OR and OP/TC of the eligible unit was 35.18% and 54.2% respectively skewed and higher than the comparable unit.*
>
> *Accordingly the TPO in his order made adjustment of Rs.12,06,40,000/- towards the inter-unit transactions between the eligible and non-eligible unit.*
>
> *2. On giving consideration to the submissions of the appellant and the observations of the ld. TPO, I find sufficient force in the appellant's claim that the ld. TPO could not have summarily rejected the application of CPM in the given facts of the present case without pointing out any specific defect or infirmity in the benchmarking exercise performed by the assessee. It is noted that the Id. TPO made a sweeping remark that the method followed by the appellant was devoid of any logic without explaining his reasons and basis for coming to such conclusion. From the facts on record, it is noted that the goods supplied by the non-eligible unit to eligible unit were semi-finished goods. The certificate issued by the cost accountant showed that the goods were transferred at its factory cost plus a mark-up of 10%. I note that this manner of*

ascertainment of cost plus mark-up is in conformity with Rule 8 of the Central Excise Valuation (determination of price of excisable goods) Rules, 2000 read with proviso to Rule 9 which reads as follows:

> *Rule 8*
>
> *Where the excisable goods are not sold by the assessee but are used for consumption by him or on his behalf in the production or manufacture of other articles, the value shall be one hundred and ten percent of the cost of production on manufacture of such goods.*
>
> *Rule 9*
>
> *Provided that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value shall be determined in the manner as specified in Rule 8.*

3. In the present case, the semi-finished goods is utilized for consumption by the Rudrapur Unit for production of final automobile gear. As per Excise Rules, the value of such semi-finished goods transferred to AE is required to be 110% of the cost of production. Accordingly, it is noted that the appellant acted in conformity with the Excise Rules, when it sold semi-finished goods to the AE at one hundred and ten percent of the value of the cost of production. The relevant statement of cost of production as certified by the cost auditor along with the relevant Excise Rules and sample excise returns as furnished by the appellant are found to be in order. In view of the foregoing therefore I find sufficient merit in the application of CPM by the appellant-company and the benchmarking exercise performed therein. It is noted that the application of CPM is in accordance and compliance with Central Excise Rules and for the purposes of payment of excise duty, the said value is accepted to be arm's length price. Accordingly, I am of the considered view that in the transfer pricing assessment, it was no longer open for the ld. TPO to question the said value and alleged that the transfer price recognized by assessee did not in fact represent arm's length price. Hence, CPM is held to be the most appropriate method in the given facts of the present case and the statement of cost as certified by the cost auditor is found to be justified. The inter-unit transactions in question are therefore held to be at arm s length and therefore the impugned adjustment of Rs.12,06,40,000/-is held to be unwarranted on facts and in law.

4. Moreover, I also find merit in the ld. AR's contention that internal TNMM was not the appropriate method since there were material differences between the units at Faridabad and Rudrapur. It Is observed that the automobile gears and shafts manufactured at Faridabad plant are bigger In size and are based on old technologies, whereas the automobile gears manufactured at Rudrapur plant are smaller In size based on newer technology. As a consequence the Input cost is relatively higher at Faridabad Unit and the margins are low. I therefore find that the appellant has been able to substantiate with cogent evidence regarding the higher profitability of the eligible unit. I further note that even the processes which are being undertaken in respect of gears manufacturing are materially different at Faridabad and Rudrapur units. On these facts, it is held that the Unit at Faridabad was not comparable with the Unit at Rudrapur and in that view of the matter the application of internal TNMM was flawed and untenable.

5. The adjustment made by the Ld. TPO being Rs.10,84,53,000/-, i.e, downwards adjustment addition for the amount of raw materials transferred from the Faridabad Unit to the Rudrapur Unit. In the foregoing paragraphs I have already observed and concluded that the two units at

Faridabad and Rudrapur are not comparable, and therefore the margins of these two units cannot be compared for the purpose of adjustment. In the matter of the transfer of materials from the Faridabad Unit to the Rudrapur Unit, it is to be stated that such material is of semi-finished stage, and the relevant excise valuation has also been furnished by the appellant along with the Cost Audit Report. The detailed calculation of the valuation is also available in the Cost Audit Report, and therefore the valuation is also acceptable and moreover the valuation being in accordance with the Audit Report, in my carefully considered view of the matter, the same while not being conclusive in itself, does bear substantial value in the eyes of the statute. Further, the method followed in Transfer Pricing report or documentation as submitted is not final. The aim of transfer pricing study is to determine the arm's length price, and the same can be arrived at by placing materials at a later stage before the Ld. TPO or Ld. A.O., and in this case, I observe that the appellant has placed adequate material at a later stage before the TPO / A.O, and there was adequate opportunity for the Authorities concerned to examine such materials. I observe that for the case at hand, the appellant-company has duly submitted before the Ld. TPO as regards the justification or following CPM method, although in the Transfer Pricing Study report TNMM had been followed. For such reasons as set out, I take a view that the subject materials so transferred from Faridabad Unit have been correctly valued. I observe that the material transferred from Faridabad Unit to the Rudrapur Unit in accordance with the "excise valuation rules", and hence the allegation of the material transferred by the Faridabad Unit to the Rudrapur Unit not being at arm's length appears to be misplaced. The appellant has also produced necessary bills of parties for similar material purchased from 3rd party vendors by the Rudrapur Unit. Although the quality of materials purchased by 3rd Party vendors are not comparable with that transferred from the Faridabad Unit, the rates of purchase from 3rd Party vendors are definitely are definitely an indicator of the genuineness of the Transfer Price from the Faridabad Unit to the Rudrapur Unit, and in such context I observe that the rate of transfer from Faridabad Unit is lower than the rate of purchase from 3rd Party vendors. After carefully examining the material on record, I find substantial merit In the arguments of the appellant. Hence the adjustment made by the Ld. TPO and as accepted by the Ld. A.O are not sustainable In the facts of the case, and the law applicable.

6. Likewise, it is to be observed, that an upward adjustment has been made by the Ld. TPO of Rs. 1,29,82,000/- in respect of income earned by the Rudrapur Unit for job work done for the Faridabad Unit. In the said matter, the appellant has duly samples of invoices of job work. On a carefully perusal of the same, I observe that the job work executed by the Rudrapur Unit appears to be in conformity with the market rate of such job-work, and hence following the CUP method, the arguments of the appellant are with sufficient merit. I do not perceive any merit in the additions made by the Ld. A.O which have been made merely by comparing the margins of the two units and without considering the relevant finer details furnished before him. Hence, upon consideration of the finer details which had been duly furnished by the appellant before the Ld. TPO, these adjustments do not stand. The said adjustment of Rs.1,29,82,000/- therefore is also not sustainable.

7. For the reasons set out above therefore, it is held that CPM was the most appropriate method in the given facts of the present case and based on the same the inter-unit transfers are held to be at arm's length. The Ld. AO/TPO is accordingly directed to delete transfer pricing adjustment of Rs.12,06,40,000/-and accordingly re-compute the eligible deduction u/s 80-IC of -the Act. These grounds of appeal therefore stands allowed."

7. The Ld. D.R. submitted before that the Bench the assessee itself in form 3CEB submitted along with the return of income has applied TNMM as MAM and certified that the transactions were at ALP which the assessee tried to change before the TPO to CPM method despite the fact the TNMM was set out in the TPSR. The ld DR submitted that in the TPSR the assessee has furnished net profit margin and net gross profit margin and therefore the CPM is not correct. The ld DR argued that application of CPM required comparison of gross margin and not net margin. The ld DR also submitted that CPM is not applicable to routine manufacturers. The ld DR submitted that the TPO has rightly adopted TNMM for determining the ALP of transactions between inter units as there were huge variation in the profit margin of the two units. The Ld. D.R. submitted that both these units are operating independently and manufacturing the same products. The Ld. D.R. submitted that the assessee is not a contract manufacturer and therefore the cost plus method is not applicable in the present case but the TNMM is the most appropriate method as the assessee has transferred the profits from non-eligible unit to eligible unit and thus the transactions were not at arm's length. The ld DR referred to OECD guidelines, UN TP Manual and ICAI Guidance Note which state that CPM is applicable only when the assessee is undertaking limited manufacturing functions or acting as contract manufacturer or selling semi finished goods and therefore it cannot be applied when the assessee is engaged in routine manufacturer and undertaking entire gamut of functions which a full-fledged manufacturer undertakes. The ld DR contended that CPM will only compares gross margin which will never be correct reflection of various functions performed by the manufacturers. The ld. D.R. submitted that the TPO has rightly proposed TNMM is the most appropriate method for benchmarking the purchase of semi-finished goods from Faridabad unit and job work services rendered by Rudrapur to Faridabad. The Ld. D.R. also referred to the unit level margin of OP/OR 4.30% and OP/TC 4.50% which were not falling within the range of +/-3% of margin of Rudrapur unit which was 35.17% to 54.27%. The Ld. D.R. also referred to Form 3CEB filed by the assessee where the transactions were stated to be benchmarked

following the TNMM and therefore TPO was quite justified in not accepting the contentions of the assessee to apply cost plus method and considered internal TNMM as most appropriate. The Ld. D.R, therefore, submitted that the order of Ld. CIT(A) may kindly be quashed and that of TPO/AO may be restored.

8. Per contra, the Ld. A.R strongly opposed the arguments of the Ld. D.R by submitting that the unit at Rudrapur was set up for FY 2007-08 and accordingly for deduction u/s 80IC was claimed for the first time in AY 2008-09 and this being the 7th hear. The Ld. A.R. submitted that the assessee has been claimed deduction u/s 80IC of the Act since AY 2008-09 and all along the transactions in respect of transfer of semi finished goods from Faridabad unit to Rudrapur unit and job work done by Rudrapur unit for Faridabad unit have been accepted by the Department in the assessment framed u/s 143(3) of the Act. The Ld. A.R. submitted that the TPO has merely compared the net profit margin of Faridabad unit and Rudrapur unit and considered the variance in net profit margin of two units at 30.87% and applied the same as internal TNMM. The Ld. A.R stated that the unit at Rudrapur and Kolkata are not functionally similar or comparable as Faridabad unit is manufacturing gears for tractors and bigger trucks with plant and machinery also being very old whereas the Rudrapur unit manufactures 3rd & 4th gears for small trucks solely supplying them to Tata Motors Ltd. and thus is as working captive unit of Tata Motors Ltd. The Ld. A.R. thus stated that Rudrapur unit is a contract manufacturer of Tata Motors. Rudrapur unit procures semi-finished goods from Faridabad unit in the form of shafts/blanks which are used for manufacturing and further processed to produce the 3rd & 4th gears for small truck of Tata. The Ld. A.R., while referring to the direct, indirect cost based on the costing records which were duly certified by the auditors of the company and gross profit margin, submitted that cost plus method was rightly followed by the assessee. The Ld. A.R. submitted that TPO has ignored all the facts and records as placed before him namely the cost of production of CAS-4 and Central Excise Valuation Rule which provides that the cost plus method is most appropriate. The Ld. A.R. also submitted

that the TPO has also ignored the fact that the profit margin of the assessee was at 19.99% as against the profit margin in the other external comparables which ranged between 12.29%, 18.68% and 17.84% respectively the details whereof available at page nos. 162 to 165 of the PB. The Ld. A.R. submitted that TPO has followed TNMM method without giving any justification and therefore the Ld. CIT(A) has rightly reversed the order of AO/TPO. The Ld. A.R. submitted that provisions of Section 80IA(8) mandates the comparison of market price with transfer price and it nowhere provides for determining of the alleged inflation of profit and therefore the very first stage the TPO/AO was not correct. The ld AR also stated that inter-unit transfer/services were never disputed by the TPO/AO in the earlier years even the assessment were finalized u/s 143(3) from AY 2008-09 to 2013-14. The Ld. A.R submitted that even following principle consistency the TPO/AO cannot disturb ALP domestic specified transactions by relying on the following decision:

i) *Century Ply Boards (I) Ltd.- 187 TD 35 (Kol)*

ii) Star Paper Mills Ltd.- ITA No. 127/Kol/2012 dated 26.10.2021.

The Ld. A.R further submitted that even otherwise mere extra ordinary profits cannot be criteria for adjustments in transfer pricing by relying on the decision of *A.T.Kearney (P) Ltd.- 153 ITD 694 (Del) and Zavata India Ltd.- 141 ITD 456 (Hyd).* The Ld. A.R. contended that since Rudrapur Unit is engaged in contract manufacturing and it procures the semi-finished goods and does contractual job work for Faridabad unit, therefore in terms of section 92B read with Rule 10B(1), 10C(1) &(2), CPM was the most appropriate method and has rightly been followed by the assessee. The Ld. A.R. submitted that the direct and indirect cost identified and even gross profit margin data were also available and therefore the assessee has followed the CPM method directly as per the provision of the Act. The ld. Counsel in defense of this arguments relied on the following decisions of *GE BE (P) Ltd. – ITA No. 815/Bang/2010 dated 06.12.2013 (Pg-35-44), GE Medical Systems India (P) Ltd.- ITA No. 332-333/Bang/2011 dated 30.06.2015, Diamond Dyechem Ltd.- ITA No. 3073/M/2006* *dated 14.05.2010, Wipro QE Healthcare (P) Ltd.- ITA 603/2015 (Kar-HC) dated 19.07.2018, Greaves Travel (I) Ltd.-ITA 6903/Kol/2016 dated 02.09.2019, Loreal India (P) Ltd.-TS-58-HC-2013(Bom)-TP and R S Software (I) Ltd.- TS-1359-ITAT-2018-Kol-TP*. The Ld. A.R. also referred to the net margin of the assessee vis-à-vis other comparables and submitted that the margin of the assessee was much higher than the other comparables. On the issue of assessee being the contract manufacturer, the Ld. A.R submitted that the Rudrapur is a contract manufacturer and it procures semi-finished goods, raw materials from Faridabad unit and similar job work is also done on behalf of Faridabad unit by it and therefore CPM is most appropriate method. On the arguments of the Ld. D.R. that the assessee itself followed TNMM method as certified in Form 3CEB,the Ld. Counsel for the assessee submitted that though in Form 3CEB it is mentioned as TNMM wrongly but in the TPSR, CPM was duly mentioned which was accepted by the Ld. CIT(A). The Ld. A.R referred to the decision of Mattel Toys (I) Ltd.-34 taxmann.com 203 (MUM) wherein it has considered the CPM as the most appropriate method under the similar facts. On the arguments of the Ld. D.R that both the units of the assessee are manufacturing the same products, the Ld. A.R. submitted that both the units are doing different manufacturing of different jobs of finished products by submitting that Faridabad unit manufactures gears for tractors and bigger trucks whereas Rudrapur unit manufactures 3rd & 4th gear for small trucks. The ld. A.R. also referred to the order of Ld. CIT(A) wherein the Ld. CIT(A) has followed the following decisions to come to the conclusion that CPM method has to be preferred to TNMM more particularly when data in respect of tested party/transaction is available namely i) *Hughes Systique (I) (P) Ltd.- 36 taxmann.com 41 (Delhi), ii) Aztec Software & Tech. Services Ltd.- 107 ITD 141(Bang)(SB), and iii) Gharda Chemicals Ltd.- 35 SOT 406 (Mum).* The Ld. A.R. also submitted that even the OECD guideline, UNTP manual & ICAI guidance note also refer to CPM applicable in case of transfer of semi-finished goods/job work and therefore the arguments of the Ld. D.R. that CPM is not applicable is not correct. Finally the Ld. A.R. submitted that since the assessee has submitted the cost record, CAS-4 certified by the C.A of the assessee. Thus, the Ld. A.R. submitted that valuation as per excise rules also justifies the transfer pricing of the assessee by placing reliance on the following decisions namely Century Ply Boards (P) Ltd. – 187 ITD 35 (Kol) (Para 26), Coastal Energy (P) Ltd.- TS-356-ITAT-2011 (ITA 2099/MDS/2011). Finally the Ld. A.R. submitted that the order of Ld. CIT(A) may kindly be affirmed by dismissing the ground no. 1 to 4 of the revenue.

9. We have heard the rival contentions and perused the material on record including the impugned order of the Ld. CIT(A) and decisions cited before us by both the parties. The undisputed facts as observed by us from the records are that the assessee has three manufacturing unit at Kolkata, Faridabad and Rudrapur. The unit at Rudrapur was set up in FY 2007-08 and is eligible for deduction u/s 80IC of the Act and accordingly has been claiming deduction u/s 80IC of the Act right from AY 2008-09. The department has accepted all the inter unit transactions and their ALP determined by the assessee in all the years even in the assessment proceedings where as the assessment was framed u/s 143(3) of the Act right from AY 2008-09 to 2013-14 by allowing deduction u/s 80IC of the Act. We observe on the basis of records before us that both these units at Faridabad and Rudrapur unit were manufacturing different products. Faridabad units manufactures gears for tractors and bigger trucks whereas Rudrapur unit produces 3rd & 4th gear for small truck manufactured by Tata Motors Ltd and is contract manufacturer. The Rudrapur unit procures semi finished goods in the form of shaft/blank from Faridabad unit and the same is further subjected to manufacturing processes for production of 3rd & 4th gears as such. During the year, specified domestic transactions between eligible unit and non-eligible unit were made and ALP was determined at 22.10 cr . Similarly Rudrapur unit also does some job work for non eligible unit which was transferred at a price of Rs. 4.11 cr. The assessee followed CPM as most appropriate method on the strength of the reasoning that the direct and indirect cost were available as per costing records CAS-4 which were duly certified by CA and a gross profit margin of 10% was added to arrive at the transfer price. The TPO proposed the adjustment in the arm’s length price on the ground that

there is huge difference in profit margin of both the units. We note that the assessee has made similar transaction between Rudrapur unit to Faridabad unit in the earlier year right from AY 2008-09 to 2013-14 which were accepted by the revenue even in scrutiny proceedings. Therefore on the principle consistency, the TPO/AO cannot be allowed to disturb the arm's length price adopted by the assessee as the Hon'ble Apex Court in the case of *Radhasoami Satsang vs CIT in 193 ITR 321 (SC)* has laid down that unless there is a change in facts and circumstances of the case, the stand as accepted by the revenue in the earlier years cannot allowed to be changed during the year. Similarly the case of the assessee also finds support from the two decision of the Co-ordinate benches as cited supra before us. Further find merit in the contention of the Ld. A.R. that mere extraordinary profit cannot be criteria for adjustment in the transfer price which is supported by the decisions of the Co-ordinate benches in the case of A T Kearney (P) Ltd. (supra) and Zavata India Ltd. (Supra).

10. Undisputedly the assessee has maintained cost records CAS-4 which were duly certified by the CA in respect of direct and indirect cost and the gross profit margin is also available. Therefore the CPM has to be the most appropriate method which is inconsonance the provisions of Section 92B read with Rule 10B(1), 10C(1) & (2) as the eligible unit is a contract manufacturer and procuring semi-finished goods from Faridabad unit besides doing contractual job for the said non eligible unit. The said contention of the assessee finds support from the series of decision in the case of *GE BE (P) Ltd. – ITA No. 815/Bang/2010 dated 06.12.2013 (Pg-35-44), GE Medical Systems India (P) Ltd.- ITA No. 332-333/Bang/2011 dated 30.06.2015, Diamond Dyechem Ltd.- ITA No. 3073/M/2006 dated 14.05.2010, Wipro QE Healthcare (P) Ltd.- ITA 603/2015 (Kar-HC) dated 19.07.2018, Greaves Travel (I) Ltd.-ITA 6903/Kol/2016 dated 02.09.2019, Loreal India (P) Ltd.-TS-58-HC-2013(Bom)-TP and R S Software (I) Ltd.- TS-1359-ITAT-2018-Kol-TP*. We also note that assessee's net profit as a whole of 19.99% during the year which is better and much higher than other comparables namely M/s Bharat Gears Ltd. 12.29%, M/s JMT Auto Ltd. 18.68% and M/s Hi-Tech Gears Ltd. 17.84%. Therefore considering these facts which

show the net margin of the assessee being better than the comparable industries, we are of the view that price as determined by the assessee is at ALP. On the other hand, we do not find in the merit of the submissions of the ld DR that the assessee is not a contract manufacturer which are incorrect observations on the part of the TPO/AO. As regards the argument of the ld DR that the assessee itself followed TNMM method as mentioned in Form 3CEB, we observe the same was a mistake as the assessee in the TPSR mentioned CPM as MAM correctly and also placed the documents justifying and corroborating the fact that the assessee has followed CPM for benchmarking the domestic transactions between eligible unit and non-eligible unit. We also observe that OECD guidelines, UNTP manual & ICAI guidance Note also refer to CPM to be applicable where the semi-finished goods are transferred & job work is done. We have also perused the order of Ld. CIT(A) wherein the Ld. CIT(A) while allowing the appeal as this issue has followed the decisions in the case of *Hughes Systique (I) (P) Ltd.- 36 taxmann.com 41 (Delhi), Aztec Software & Tech. Services Ltd.- 107 ITD 141(Bang)(SB), Gharda Chemicals Ltd.- 35 SOT 406 (Mum).*Considering all these facts and circumstances and ratio laid down in the various judgments we are inclined to uphold the order of Ld. CIT(A) by dismissing ground nos. 1 to 4 of the revenue.

11. In the assessee's cross objection , ground no. 1 & 2, have been taken in support of the ld CIT(A) on the issue of ALP of the specified Domestic Transactions. Since we have dismissed the appeal of the revenue assailing the order of ld CIT(A) on the issue of deletion of TP adjustment by holding the CPM as MAM, the ground 1 & 2 raised by the assessee in the CO as stated above become infructuous and are accordingly dismissed.

12. The issue raised in ground no. 5 by the revenue is against the order of Ld. CIT(A) allowing the additional depreciation of Rs. 60,66,115/- u/s 32(1)(iia) of the Act which was rejected by the AO.

13. Facts in brief are that the assessee had made some additions to fixed asset in the latter half of F.Y. 2012-13 and consequently the assets were put to use for less than 180 days. Accordingly, the assessee claimed depreciation @ 10% being 50% of normal rate of depreciation. During the year, the assessee claimed 10% additional depreciation on the ground that the assessee had claimed only 50% depreciation in FY 2012-13 in terms of proviso to Section 32(1) of the Act. The assessee referred to the Finance Act, 2015 inserting to proviso to Section 32(1)(iia) effective w.e.f 01.04.2016 providing that where assets has been put to use for the purpose of business for a period less than 180 days in the previous year, the deduction shall be allowed in respect of depreciation @ 50% of normal depreciation as prescribed under clause (iia) and the deduction in the remaining 50% of the amount calculated at the normal rate as prescribed under clause (iia) shall be allowed under sub-section (1) in the succeeding year. The AO disallowed the deduction on the ground that the Finance Act, 2015 has made this provisions w.e.f. 01.04.2016 and consequently the assessee is not entitled to claim the deduction for AY 2014-15 of Rs. 60,66,115/-.

14. In the appellate proceedings the Ld. CIT(A) allowed the appeal by referring to the provision of Section 32(1) of the Act and also to the Finance Act, 2015 inserting proviso to Section 32(1)(iia). The Ld. CIT(A) also referred to the decision of Co-ordinate bench in the case of M/s Birla Corporation Ltd. vs. DCIT reported in [2015] 55 taxmann.com 33 (Kolkata-Trib) while allowing the appeal of the assessee wherein the similar issue has been decided in favour of the assessee.

15. After hearing the rival parties and perusing the material on record, we note that 4the additional depreciation has been denied by the AO on the ground that there was no provision in the Statute granting additional depreciation to the assessee which has not been allowed in the preceding assessment year in which the conditions were made

on the ground that the provision of Section 32(1)(iia) of the Act provides that the assessee is entitled to claim depreciation @ 50% of the of the normal rates as prescribed under clause (iia) and the said benefit has been specially granted w.e.f. 1.4.2016 by Finance Act,2015 from AY 2016-17 . We note that the issue has been decided by the coordinate bench in M/s Birla corporation Ltd. vs. DCIT (supra) by holding that assessee is entitled to remaining 50% of the depreciation in the subsequent year where the said depreciation could not be claimed in preceding assessment year because of the reason that the asset was put to use for less than 180 days in terms of provision of Section 32(1)(ii) of the Act. The operative part of the case M/s Birla corporation Ltd. vs. DCIT is extracted below:

> *"We have heard rival submissions and gone through facts and circumstances of the case. The facts are admitted and there is no dispute on the facts. Only issue for adjudication is whether the assessee is entitled for the balance 50% additional depreciation in view of sec. 32(1)(iia) of the Act in the next assessment year for remaining unutilized additional depreciation. We have gone through the relevant provisions of second proviso to section 32(1)(ii) and 32(1)(iia) of the Act. In the present case before us, the assessee has purchased and installed new plant and machinery for its manufacturing unit and put to use for a period of less than i.e. 180 days, during the FY 2005-06 relevant to AY 2006-07 and claimed 50% additional depreciation u/s. 32(1)(iia) of the Act in view of the second proviso to section 32(1)(ii) of the Act. Further, the balance 50% of additional depreciation on such plant and machinery has been claimed by the assessee company during the year under consideration i.e. the FY 2006-07 relevant to this assessment year 2007-08. A bare reading of clause (iia) of section 32(1) of the Act w.e.f. the AY 2006-07, provides for allowance of additional depreciation equal to 20% of actual cost of new plant and machinery acquired and installed after March, 31st 2005 by an assessee engaged in the business of manufacture or production of any article or thing. Such additional depreciation is to be allowed as deduction u/s. 32(1)(iia) of the Act but second proviso to section 32(1)(ii) restricts the allowance of depreciation at 50%, if the plant and machinery is acquired during the previous year is put to use for a period of less than 180 days in that previous year. The second proviso specifically makes a reference to an asset referred to in clause (iia) of the said section 32(1) of the Act. And it is because of the second proviso assessee claimed only 50% additional depreciation for AY 2006-07 and accordingly, claimed the balance amount of additional depreciation in the immediately subsequent year i.e. the year under consideration AY 2007-08. We are in full agreement with the argument of Shri J. P. Khaitan, Senior Advocate that a bare reading of section 32(1)(iia) clearly shows that the assessee is eligible for additional depreciation in case the new machinery and plant was acquired and installed after 31-03-2005. There is no restrictive condition in the clause for the eligibility of the assessee to claim additional depreciation. When the assessee is eligible for depreciation @ 20%, in the absence of any specific provision, the AO cannot cut down the scope of deduction by referring to second proviso to section 32(1)(ii) of the Act. He also pointed out that even if there is any contradiction between sections 32(1)(iia) and second proviso to section 32(1)(ii), it has to be reconciled so as to give harmonious effect to the legislative intent. The benefits conferred on the assessee by way of incentive provision cannot be taken away by adopting an implied meaning to second proviso to section 32(1)(ii) of the*

> *Act. Since the second proviso to section 32(1)(ii) does not expressly prohibit the allowance of the balance 50% depreciation in the subsequent year, second proviso to section 32(1)(ii) shall not be interpreted to mean that it impliedly restrict the additional depreciation to be allowed in the subsequent assessment year. We are of the view that the assessee now is entitled for 50% additional depreciation, because in the year in which the machinery was first put to use the assessee claimed only 50% of additional depreciation for the reason that the same was put to use for less than 180 days, in this assessment year for the balance of depreciation."*

Similar ratio was laid down in the case of Cosmo Fins Ltd.- 139 ITD 683 (Del) and DCIT vs. National Engg. Industries Ltd.-193 ITD 420 (kol). Since the issue before us is same as decided by the co-ordinate benches (supra), we therefore respectfully following the decisions of respective benches dismiss the ground no. 5 raised by the revenue by confirming the order of Ld. CIT(A) on this issue.

16. The issue raised in ground no. 6 is against the order of Ld. CIT(A) allowing the foreign currency loss of Rs. 1,65,65,143/- by the Ld. CIT(A) which was denied by the AO on the ground that being notional and contingent in nature.

17. Facts in brief are that during the year, the assessee has charged in the profit and loss account a sum of Rs. 1,65,65,143/- under the head foreign currency loss. Upon noticing the same , the AO called upon the by order sheet dated 4.12.2017 to furnish the details of foreign currency loss and also justify the claim as to how this loss was admissible which was replied by the assessee vide written submission dated 8.12.2017 by submitting that the assessee has obtained term loan of Rs. 19.50 crore for the purchase of new plant and machinery which was sanctioned by the bank vide letter No. RM-11/9/218 dated 9.12.2009 with repayment in 7 years including moratorium period of 2 years at 11.50% per annum with monthly rest. As per the terms of loan 3 Capex LC(buyer's credit) was sanctioned within the term loan limit which was obtained for payment of three machines purchased from abroad. The assessee has not taken any borrowing in Foreign Exchange directly however the bank has forex exposure for providing LCs to assessee and consequently the bank debited Rs. 1,65,65,143/- as bank charges which actually represented the loss suffered by the bank due to forex fluctuations. Accordingly to AO , since the assessee has borrowed term loan of Rs. 19.50 crore and approached the bank to arrange buyer credit against which

three imported machines were purchased within the sanction of term loan. According to AO, since the buyer's credit was utilized by the assessee to replace the term loan used for purchase of new plant and machinery hence it relates to capital asset and proviso to section 43A of the Act comes into play. Consequently the AO disallowed Rs. 1,65,65,143/- and added to the same to the income of the assessee.

18. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee on the ground that the loss is not an account of foreign currency fluctuations as the assessee has no direct exposure to foreign currency and is not incurred by the assessee but an arrangement by the bank further to which the assessee is not a part. The ld CIT(A) thus observed that the assessee has obtained loan in Indian currency and subsequent conversion by bank to facilitate the customer does not fall within the ambit of Section 43A of the Act. The Ld. CIT(A) observed that entire arrangement was facilitated by the bank and is not covered u/s 43A of the Act and the said charges are bank charges recovered by the bank from the assessee by relying on the decision of co-ordinate bench in the case of Cooper Corporation (P) Ltd. vs. DCIT in 159 ITD 165 (Pune).

19. After hearing both the parties and perusing the material on record and minutely analyzing the provisions of Section 43A, we find that an amount debited by the bank of Rs. 1,65,65,143/- as bank charges is in fact the loss on account of forex fluctuations. In our considered opinion though the assessee did not have any direct exposure of forex but certainly the assessee have indirect exposure through bank and thus this is the forex loss indirectly incurred by the assessee. Hence this is covered by the provisions of Section 43A. We have carefully perused Section 43A which begins with non-obstante clause and provides that where assessee has acquired any asset during the previous year from outside the country for the purpose of business or profession and in consequence of forex fluctuations in the rate of exchange after acquisition of asset there is an increase or reduction in the liability of the assessee as expressed in Indian currency as compared to the liability existing at the time of making payment

towards the whole or a part of the cost of the asset or towards the repayment of the whole or a part of the moneys borrowed by the assessee from any person, directly or indirectly in any foreign currency specifically for the purpose of acquiring asset along with interest if any, the amount by which the liability as aforesaid is so increased or reduced during previous year and which is taken into account at the time of making the payment irrespective of the method of accounting adopted by the assessee shall be added to or deducted from the actual cost of the asset. Therefore , the arguments of the ld Counsel of the assessee can not be accepted on this issue. In view of this we are not in agreement with the conclusion drawn by the ld CIT(A) on this issue and are inclined to reverse the appellate order by restoring the order of AO. However we find force in the alternative argument of the ld Counsel for the assessee that the assessee is entitled to depreciation on this amount of loss after it is capitalized in asset cost. Accordingly the AO is directed to allow depreciation on this amount at the applicable rate of depreciation after capitalizing the loss. The ground no. 6 raised by the revenue is partly with the above observations.

20. In the assessee's cross objection , ground no. 3 has been taken in support of the ld CIT(A) allowing Rs. 1,65,65,143/- being loss resulting from Foreign Exchange Fluctuations as allowable expenses whereas in ground no. 4 an alternative ground has been taken by the assessee that in the event the above amount of loss is not allowed as expenses , then the depreciation may be allowed by allowing capitalization of the loss under relevant assets. Since we have decided the issue in the revenue appeal in favour of the revenue by reversing the order of ld CIT(A) on the issue of allowing loss on foreign exchange fluctuations as expenses, the ground no. 3 becomes infructuous and is accordingly dismissed. Further we have given direction in para 18 supra directing the AO to capitalize the loss of Rs. 1,65,65,143/- under the relevant assets and allow depreciation as per the provisions of section 32 of the Act. Cosequently the ground no. 4 in the cross objection is allowed.

ITA No. 264/Kol/2020 & CO No. 05/Kol/2021 A.Y. 2015-16.

21. The issue raised by the revenue in ground no. 1 to 4 is identical to one as decided by us in ground no. 1 to 4 in ITA No. 263/Kol/2020 A.Y. 2014-15 dismissing these ground by upholding the order of ld CIT(A) by upholding the CPM as MAM. Therefore our decision would, mutatis mutandis, apply to ground no 1 to 4 of this appeal and accordingly ground no. 1 to 4 are dismissed. Similarly in the CO the assessee has taken ground no. 1 & 2 in support of order ld CIT(A) on the issue of upholding the CPM as MAM. Since we have dismissed the ground 1 to 4 in revenue appeal upholding the order of CIT(A), the ground 1 & 2 of CO become infructuous and are accordingly dismissed.

22. In the result, the appeal of the revenue and CO of the assessee in A.Y. 2014-15 are partly allowed and the appeal of the revenue and CO of the assessee in A.Y. 2015-16 are dismissed.

Order is pronounced in the open court on 23rd June, 2022

Sd/-	Sd/-
(Sonjoy Sarma) Judicial Member	(Rajesh Kumar) Accountant Member

Dated: 23rd June, 2022

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- DCIT, Circle-6(1), Kolkata
2. Respondent – M/s Deepak Industries Ltd., 16, Hare Street, Kolkata-700001.
3. The CIT(A)- 22, Kolkata (Sent through e-mail)
4. Pr. CIT- Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata