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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 14.10.2024*

\+ **ITA 514/2024 & CM APPL. 59663/2024**

THE PR. COMMISSIONER OF INCOME TAX -7 .....Appellant

Through: Counsel (appearance not given).

versus

SABIC INDIA PVT LTD. .....Respondent

Through: Mr. Ajay Vohra, Senior Advocate with Mr. Aditya Vohra and Mr. Shashvat Dhamija, Advocates

**CORAM:**
**HON'BLE MR. JUSTICE VIBHU BAKHRU**
**HON'BLE MS. JUSTICE SWARANA KANTA SHARMA**

**VIBHU BAKHRU, J. (Oral)**

1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereafter *the Act*) impugning an order dated 08.06.2021 (hereafter *the impugned order*) passed by the learned Income Tax Appellate Tribunal (hereafter *the Tribunal*) in ITA No. 454/Del/2021 captioned *SABIC India Pvt. Ltd. v. DCIT Circle - 22(2) New Delhi*.

2. The assessee (M/s Sabic India Pvt. Ltd.) had preferred the aforesaid appeal [ITA 454/Del/2021] assailing the assessment order dated 31.03.2021 (hereafter *the assessment order*) framed under Section 143(3) of the Act read with Section 144C(13) of the Act, for the assessment year (hereafter *AY*) 2016-17. The assessee was aggrieved by the enhancement of its total income

by a sum of ₹3,61,32,20,620/- on account of transfer pricing adjustment in terms of the order passed by the Transfer Pricing Officer (TPO). The assessee's appeal was allowed by the Tribunal.

3. The assessee had filed its return of income on 25.11.2016 in respect of AY 2016-17 declaring a total income of ₹77,82,14,150/-. The said return was picked up for scrutiny and a notice was issued under Section 143(2) of the Act. The assessee had during the year in question entered into international transactions with its Associated Enterprises (AEs) and accordingly, the assessee's case was referred by the Assessing Officer (AO) to the TPO for examining whether the international transactions between the assessee and AEs were on an arm's length basis.

4. The assessee furnished its transfer pricing studies to the TPO. The assessee had adopted the transactional net margin method (TNMM) to benchmark its international transactions. However, the said studies were rejected. The TPO held that the TNMM was not an appropriate method to benchmark the international transactions and adopted the "other method" [Rule 10B(1)(f) of the Income Tax Rules, 1962 (hereafter *the Rules*)], which according to the TPO was not a comparable uncontrolled price method (CUP method) but was somewhat akin to the said method, with wider latitude.

5. It is material to note that there was no cavil as to the functional profile of the assessee. The assessee is a part of the SABIC Group. The holding company of the said Group – Saudi Basic Industries Corporation (SABIC) is a public company with its principal office located in Riyadh, Saudi Arabia. It was listed in the Saudi Arabia Stock Exchange since 1984. The SABIC Group

had operations in fifty countries with a global workforce of approximately 40,000 individuals. It was stated that SABIC is amongst the market leaders in production of polyethylene, polypropylene and other advanced thermoplastics, glycols, methanol, and fertilizers.

6. The assessee was incorporated on 15.06.1992 as an enterprise wholly owned by foreign entities. The share capital of the assessee company is subscribed by the following entities as on 31.03.2016, which is as under:

| **"S. No.** | **List of shareholders** | **No of Shares** | **Percentage Holding** |
|---|---|---|---|
| 1. | Sabic Global Limited, UK | 20,40,000 | 51% |
| 2. | Sabic Asia Pacific Pte Ltd., Singapore | 19,60,000 | 49% |
| | **Total** | **40,00,000** | **100%"** |

7. The assessee is engaged in providing marketing support services to facilitate SABIC Group to sell fertilizers, chemicals, and polymers primarily in India and in the Indian sub-continent (Nepal, Maldives, Bhutan, Sri Lanka and Bangladesh). The assessee merely provides support to its AEs and does not enter into any contract with customers or trade in the products supplied by AEs. The AEs supply their products to the customers and raise invoices directly on the customers. The assessee does not book any sales revenue in its books. The assessee receives its revenue as consideration (commission) for its marketing support services.

8. During the previous relevant year to the AY 2016-17, the assessee had received an amount of ₹87,92,14,730/- for providing marketing support services. The assessee had also made a payment of ₹14,75,826/- for training and SAP related expenses. The said transactions were identified as international transactions.

9. The transactions relating to payment for training and SAP related expenses were considered as inextricably linked to the activities carried out by the assessee and therefore, no separate benchmarking study was undertaken.

10. The assessee had selected TNMM as the most appropriate method and had used the ratio of Operating Profits/Value Added Expenses (OP/VAE) and Gross Profit/Value Added Expenses (GP/VAE) as the profit linked indicators (PLI) to benchmark the international transactions. On the basis of certain comparables found as the comparable entities, the assessee had submitted its analysis as under:

| PLI | Tested party's operating margin | Comparable companies average (without working capital adjustment) | Comparable companies average (after working capital adjustment) |
|---|---|---|---|
| OP/VAE | 369.39% | 25.13% | -23.08% |
| GP/VAE | 469.39% | 125.13% | 76.92% |

11. The assessee had also furnished its agreements with AEs and had disclosed the fees received as percentage of sales for various products as under:

(a) All Chemical Products 0.9%

(b) Plastic Products 2.0%

(c) PVC 1.5%

(d) All fertilizer product 0.5% of the consideration collected from the customers.

12. The TPO conducted a search of the available data base and noted certain comparables, which according to the TPO indicated an average rate of remuneration as 7.67% of the sales. The TPO also held that TNMM was not the most appropriate method in the case of the assessee on the ground that the assessee company operated as a commission agent and did not enter into contracts with the customers or acquire title to any inventory. The TPO noted that the assessee did not "*act as a buy-sell organization*".

13. The TPO also faulted the assessee for selecting companies which were engaged in trading operations as comparables and held that the search process adopted by the assessee was significantly flawed and could not be relied upon.

14. The TPO also considered the assessee's objection to the use of comparable uncontrolled price method (CUP method) and held that the residual method (other method) as referred to in Rule 10B(1)(f) of the Rules [any other method] as provided under Rule 10AB of the Rules would be the most appropriate method. The TPO proceeded to select comparables and determined the median rate of commission at 5%. A tabular statement setting out the final selection of comparables as included in the order dated 29.10.2019 passed by the TPO is set out below:

| S. | Ref. | Agreement | Agreement Type | Industry | Cost | Exclusivity | Rate |
|---|---|---|---|---|---|---|---|

| No. | | Title | | | Base | | |
|---|---|---|---|---|---|---|---|
| 1 | L22581 | Non Compete Agreement | Asset Purchase, Patent, technology, trademark | Chemicals | Net Sales | Exclusive | 5.00% |
| 2 | L291 | Distribution Agreement | Distribution | Business Services | Net Sales | Unknown | 5.00% |
| 3 | L23918 | Distribution Agreement | Distribution, Trademark, Trade Name | Educational Services, Business Services | Net Sales | Exclusive | 15.00% |
| 4 | L17961 | Technology Assistance and Marketing Support Agreement | Services, Technology | Chemicals | Net Sales | Unknown | 3.75% |
| 5 | L11144 | Exclusive Sales and Distributorship Agreement | Distribution | Chemicals | Net Sales | Exclusive | 10% |
| 6 | L6245 | License Agreement | Know-how, Patent, Process, technology | Chemicals, Recycling & Sanitation, Environmental & Green Technologies | Net Sales | Exclusive | 7.50% |
| 7 | L17964 | Technical Assistance and Marketing Support Agreement | Services, Technology | Chemicals, Recycling & Sanitation | Net Sales | Unknown | 3.75% |
| Median | | | | | | | 5% |

15. On the basis of the median rate of commission computed at 5%, the TPO determined the upward adjustment of ₹3,61,32,20,620/- under Section 92CA of the Act. The computation as set out in the order dated 29.10.2019 passed by the TPO is reproduced below:

| "Particulars | Amount (INR) |
|---|---|
| Sales generated by the AEs in India [A] | 89,84,87,07,000/- |
| Arm's length rate of commission (%) [B] | 5.00% |
| Commission income at ALP [C =A*B] | 4,49,24,35,350/- |
| Commission income of taxpayer [D] | 87,92,14,730/- |

| | |
|---|---|
| **Adjustment u/s 92CA [E=C-D]** | **3,61,32,20,620/-**" |

16. Based on the order dated 29.10.2019 passed by the TPO, the AO framed a draft assessment order, which was appealed by the assessee before the Dispute Resolution Panel (DRP). The assessee assailed the decision of the TPO to reject TNMM and adopt another method. Additionally, the assessee also assailed the comparables as selected by the TPO on the ground that the same did not meet the comparability criteria. The DRP did not find any fault with the decision of the TPO in rejecting the TNMM and held that the TPO had furnished sufficient reasons justifying the application of the other method as provided under Rule 10AB of the Rules. Insofar as comparables selected by the TPO are concerned, the DRP accepted the assessee's objection to include the following comparables: (i) L17961 Maciej Zalewski Trustee; Maciej Zalewski, an individual and Polymer Energy LLC, (ii) L11144 Bioshield Technologies Inc. and Sanitary Coating Systems, LLP, and the assessee's objections to other comparables were rejected.

17. Aggrieved by the decision of the DRP and the final assessment order, the assessee preferred an appeal before the Tribunal. One of the principal grounds raised by the assessee was regarding the decision of the TPO and the DRP to reject the TNMM adopted by the assessee in respect of the provision of marketing support services. The Tribunal accepted the assessee's contention and faulted the TPO and the DRP for rejecting TNMM as the most appropriate method for primarily two reasons. First, that the TPO's order did not set out any reasons for rejecting the TNMM. The Tribunal held that if the TPO had any objections to the search process or the comparables used by the assessee, the same could be rejected. However, the selection of comparables

could not be a ground for rejecting TNMM as the most appropriate method. The Tribunal also noted that the TNMM had been consistently followed in determining the arm's length price (ALP) for the past assessment years 2009-10 to 2014-15 and thus, the same ought not to have been rejected.

18. The Tribunal also held that before adopting the "other method" under Rule 10B(1)(f) of the Rules, the TPO was required to give reasons for discarding the other five methods as mentioned in the said sub-rule. However, the TPO had not provided any reason for discarding other methods as well.

19. The Tribunal also referred to the earlier decisions of this Court in ***Sumitomo Corporation India Private Limited v. Commissioner of Income Tax: (2016) 387 ITR 611 (Delhi)*** and ***Li & Fung India Pvt. Ltd. v. Commissioner of Income Tax***: ***(2014) 361 ITR 85 (Delhi)*** for supporting the view that TNMM would be the most appropriate method.

20. In ***Sumitomo Corporation India Private Limited v. Commissioner of Income Tax*** (*supra*), this Court had considered the efficacy of TNMM with Berry ratio (ratio of operating profits to selling, general and administration expenses) as the PLI. This Court had held that the Berry ratio had limited applicability but it could be used effectively in cases where the value of goods had no role to play in the profits earned by the assessee and the same was directly linked with the operating expenditure incurred by the assessee. This Court had also pointed out that in case where the assessee used intangibles as a part of business or other valuable fixed assets, Berry ratio would not be an apposite PLI as the value of tangibles as well as the value added by substantial fixed assets would not be captured in the operating cost.

21. In ***Li & Fung India Pvt. Ltd. v. Commissioner of Income Tax*** (*supra*), the Court considered a case where the assessee had received service charges of 5% of cost plus markup for providing buying services for sourcing garments, handicrafts, leather products in India for its AE. In the said case, the Court upheld the use of TNMM as the most appropriate method and further held that "*once the transactional net margin method was deemed the most appropriate method, the distortions, if any, had to be addressed within its framework*".

22. The Tribunal also referred to the Guidelines issued by the Institute of Chartered Accountants of India (ICAI) in support of the conclusion that it would be necessary for the TPO to provide reasons for rejecting all other five methods [as specified in Clauses (a) to (e) of Rule 10B(1) of the Rules] while selecting the other methods.

23. In addition to the above, the Tribunal also faulted the DRP for rejecting some of the objections raised by the assessee in respect of the comparables selected by the TPO.

24. In the aforesaid backdrop, the Revenue has projected the following questions for consideration of this Court:

> "2.1 Whether in the facts and circumstances of the case the Ld. ITAT was right in law in considering TNMM as most appropriate method whereas no suitable comparables are available with a view to the assessee's international transaction and its profile?
>
> 2.2 Whether in the facts and circumstances of case the Ld. ITAT was right in law in rejecting the comparability analysis done by the TPO by applying other method as

MAM and applying representative data by using CUP approach?

2.3 Whether in the facts and circumstances of the case the Ld. ITAT was right in law in rejecting TPO's approach for the use of data available on Royaltystat which should be considered as representative data with a view to the assessee's nature of business and its international transaction?

2.4 Whether in the facts and circumstances of the case and in law Ld. ITAT has not erred in holding that the TPO has not justified adoption of other method as MAM, when the TPO has given detailed reason for rejection of TNMM and adoption of modified CUP. And therefore to that extent the order of Ld. ITAT suffers from perversity?

2.5 Whether in the facts and circumstances of the case and in law Ld. ITAT has not erred in holding that comparables used by the TPO and accepted by DRP related to payment of royalty relating know how, patent and processing technology can't be accepted on business profile of the assessee, without giving cogent reasons or without rejecting the reasons given by the TPO. Therefore the order of Hon'ble ITAT is non-speaking order and needs to be set aside?

2.6 Whether in the facts and circumstances of the case and in law Ld. ITAT has not erred in rejecting the finding of DRP in para 26 of Hon'ble ITAT order totally ignoring them reasons given by DRP in its order and therefore the order of Hon'ble ITAT suffers from perversity?"

25. We have heard the learned counsel for the parties.

26. As noted above, the principal controversy relates to the decision of the TPO to reject the TNMM with Berry ratio (GP/VAE – gross profit/value added expenses) as the most appropriate method for determining the ALP.

Admittedly, the TNMM had been followed for determining the adjustments, if any, under Section 92CA of the Act for the AY 2009-10 to 2014-15. Thus, the TNMM, which had been followed earlier, could not have been rejected by the TPO without any substantial reason.

27. In ***M/s Radhasoami Satsang v. Commissioner of Income Tax: (1992) 193 ITR 321 (SC)***, the Supreme Court had observed as under:

> "11. One of the contentions which the learned senior counsel for the assessee-appellant raised at the hearing was that in the absence of any change in the circumstances, the Revenue should have felt bound by the previous decisions and no attempt should have been made to reopen the question. He relied upon some authorities in support of his stand. A Full Bench of the Madras High Court considered this question in *T.M.M. Sankaralinga Nadar & Bros. v. CIT* 4 ITC 226. After dealing with the contention the Full Bench expressed the following opinion:
>
> > "The principle to be deduced from these two cases is that where the question relating to assessment does not vary with the income every year but depends on the nature of the property or any other ques- tion on which the rights of the parties to be taxed are based, *e.g.*, whether a certain property is trust property or not, it has nothing to do with the fluctuations in the income; such questions if decided by a Court on a reference made to it would be *res judicata* in that the same question cannot be subsequently agitated..."
>
> One of the decisions referred to by the Full Bench was the case of *Hoystead v. Commissioner of Taxation* 1926 AC 155. Speaking for the Judicial Committee, Lord Shaw stated:
>
> > "Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be proper apprehension by the Court of the legal result either of the construction of the documents or the weight

> of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken."

These observations were made in a case where taxation was in issue.

12. This Court in *Parashuram Pottery Works Co. Ltd. v. ITO* [1977] 106 ITR stated:

> "…. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity...."

Assessments are certainly quasi-judicial and these observations equally apply.

13. We are aware of the fact that strictly speaking *res judicata* does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

14. On these reasonings in the absence of any material change justifying the revenue to take a different view of the matter – and

> if there was no change it was in support of the assessee – we do not think the question should have been reopened and contrary to what had been decided by the Commissioner in the earlier proceedings, a different and contradictory stand should have been taken. We are, therefore, of the view that these appeals should be allowed and the question should be answered in the affirmative, namely, that the Tribunal was justified in holding that the income derived by the Radhasoami Satsang was entitled to exemption under sections 11 and 12."

28. There is no cavil that the assessment in respect of each assessment year is a separate proceeding/case and therefore, the principle of *res judicata* does not strictly apply for assessment of income tax in other years. Having stated the above, it is also necessary to bear in mind the merits of adopting a consistent approach. Inconsistencies in the approach in assessment of tax on annual basis, would be debilitating to a conducive commercial environment. A change in the approach of assessment of tax, absent any statutory change, leads to uncertainty as to the cash flow/fund flow, which are the lifelines of commercial enterprises. Thus, unless there are cogent reasons to discard the method for transfer pricing adopted in the earlier assessment years, the TPO was required to follow the method consistently adopted for determining the ALP in prior years. We find no infirmity with the decision of the Tribunal in faulting the TPO for discarding the TNMM for determining the ALP as consistently followed in the past six assessment years (AYs 2009-10 to 2014-15), without sufficient reason.

29. As noted above, the Tribunal had also found that the TPO had not provided any reasons for not following the TNMM. A plain reading of the order dated 29.10.2019 passed by the TPO indicates that the TPO had provided no reason at all for rejecting the TNMM. The TPO had considered

the documentation furnished by the assessee and had highlighted that '*it operates as a commission agent*' and does not act as a '*buy-sell organisation*'. The TPO had further found that the assessee had applied a trading filter to identify companies having at least 50% of its revenue from trading operation, which according to the TPO, was flawed. Plainly, these afford no grounds for rejecting the TNMM. Although the TPO had found flaw in the transfer pricing documentation submitted by the assessee on account of choosing/selecting comparables – which the TPO found were not apposite – the TPO had provided no reasons whatsoever for rejecting the TNMM as the most appropriate method.

30. In view of the above, we concur with the Tribunal's view that the DRP had erred in finding that the TPO had provided justification for rejection of the TNMM. Thus, the Tribunal has rightly concluded that the TPO's decision to reject TNMM as the most appropriate method was without reasons.

31. Insofar as the TPO's decision to adopt the residual method – "*any other method*" under Rule 10B(1)(f) of the Rules is concerned, the same could be resorted to if none of the other methods were considered as most appropriate. Rule 10B(1) of the Rules sets out various methods, which may be chosen as the most appropriate method for determining the ALP in relation to international transactions. Clause (f) of Rule 10B(1) of the Rules also includes '*any other method*' as may be provided under Rule 10AB of the Rules. Rule 10AB of the Rules contemplates a method, which takes into account "*the price, which has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, with or between non associated enterprises, under similar circumstances, considering all relevant*

*facts*". Undeniably, Rule 10AB of the Rules does permit determination of the ALP by simulating the price that would have been charged in similar uncontrolled transactions under similar circumstances having regard to all relevant facts. However, the recourse to this method would be available only if none of the other methods are considered as the most appropriate method. However, as noted above, the TPO had provided no reasons for rejecting TNMM, which had been used in earlier years. The TPO had also not discussed the applicability of any other methods.

32. As noted above, the Tribunal had referred to the Guidelines issued by the Institute of Chartered Accountants of India (hereafter *the Guidelines*) in regard to use of "Other method" under Rule 10AB of the Rules.

33. The Guidelines rightly observe that the Rule 10AB of the Rules does not describe any methodology but provides flexibility to determine the price in complex transactions where third party comparable prices/transactions may not exist. The said method would be most appropriate in cases where the other methods are found to be inapposite on account of difficulties in obtaining comparable data on account of uniqueness of the transactions, which are to be benchmarked. The relevant extract of the said guidelines is reproduced below:

> "*6.56 The introduction of the Other Method as the sixth method allows the use of 'any method' which takes into account (i) the price which has been charged or paid or (ii) would have been charged or paid for the same or similar uncontrolled transactions, with or between non-associated enterprises, under similar circumstances, considering all the relevant facts. The various data which may possibly be used for comparability purposes could be:*

*(a) Third party quotations/ invoices;*

*(b) Valuation reports;*

*(c) Tender/Bid documents;*

*(d) Documents relating to the negotiations;*

*(e) Standard rate cards;*

*(f) Commercial & economic business models; etc.*

*6.57 It is relevant to note that the text of Rule 10AB does not describe any methodology but only provides an enabling provision to use any method that has been used or may be used to arrive at price of a transaction undertaken between non AEs. Hence, it provides flexibility to determine the price in complex transactions where third party comparable prices or transactions may not exist. The wide coverage of the Other Method would provide flexibility in establishing arm's length prices, particularly in cases where the application of the five specific methods is not possible due to reasons such as difficulties in obtaining comparable data due to uniqueness of transactions such as intangibles or business transfers, transfer of unlisted shares, sale of fixed assets, revenue allocation/splitting, guarantees provided and received, etc.*

*However, it would be necessary to justify and document reasons for rejection of all other five methods while selecting the 'Other Method' as the most appropriate method. The OECD Guidelines also permit the use of any other method and state that the taxpayer retain the freedom to apply methods not described in OECD Guidelines to establish prices, provided those prices satisfy the arm's length principle.*"

34. It is difficult to accept that a business model that entails providing marketing support on commission basis is not unique or one that would warrant rejecting the TNMM.

35. The assessee had also objected to the comparables used by the TPO for determining the ALP. The DRP had allowed the objections in respect of some of the comparable entities but had rejected the assessee's objections in respect of the others. The Tribunal had also found that the TPO had used certain comparable entities as included by the TPO and accepted by the DRP related to payment of a royalty pertaining to know-how, patent and process technology, which could not be accepted. The Tribunal also found that the findings of the DRP in case of a comparable as conflicting. The Tribunal noted that for one of the comparables (L17961 Maciej Zalewski Trustee; Maciej Zalewski), the DRP had rejected the use of the said entity as a comparable on the ground that the licensee was a manufacturer of machinery and equipment. However, the DRP had accepted another comparable (L6245 Zbigniew Torkaz) even though it was submitted that the Agreement was identical to the Agreement with L17961 Maciej Zalewski Trustee; Maciej Zalewski. The order passed by the TPO as well as the DRP clearly indicates that some of the comparable transactions as used could not have been considered as comparable transactions.

36. Rule 10AB of the Rules expressly contemplates adoption of a method which takes into account price that has been charged or paid, or would have been charged or paid, for the same or similar uncontrolled transaction, under similar circumstances. It is, thus, essential that the transactions which are benchmarked by using the method under Rule 10AB of the Rules are the same or similar transactions.

37. At this stage, it is relevant to set out a tabular statement setting out the comparable transactions as adopted by the TPO. The same is reproduced

below:

| S. No. | Ref. | Agreement Title | Agreement Type | Industry | Cost Base | Exclusivity | Rate |
|---|---|---|---|---|---|---|---|
| 1 | L22581 | Non Compete Agreement | Asset Purchase, Patent technology, trademark | Chemicals | Net Sales | Exclusive | 5.00% |
| 2 | L291 | Distribution Agreement | Distribution | Business Services | Net Sales | Unknown | 5.00% |
| 3 | L23918 | Distribution Agreement | Distribution, Trademark, Trade Name | Educational Services, Business Services | Net Sales | Exclusive | 15.00 % |
| 4 | L17961 | Technology Assistance and Marketing Support Agreement | Services, Technology | Chemicals | Net Sales | Unknown | 3.75% |
| 5 | L11144 | Exclusive Sales and Distributorship Agreement | Distribution | Chemicals | Net Sales | Exclusive | 10% |
| 6 | L6245 | License Agreement | Know-how, Patent, Process, Technology | Chemicals, Recylcing & Sanitation, Environmental & Green Technologies | Net Sales | Exclusive | 7.50% |
| 7 | L17964 | Technical Assistance and Marketing Support Agreement | Services, Technology | Chemicals, Recycling & Sanitation | Net Sales | Unknown | 3.75% |

38. The learned DRP had accepted the assessee's objection in respect of certain comparable transactions (L17961 and L11144), but had rejected the assessee's objection regarding other comparable entities. Thus, comparable transactions as used by the TPO and mentioned at Serial no. 4 and 5 of the above tabular statement, were directed to be excluded by the CIT(A) . However, it is also apparent from the plain reading of the tabular statement that some of the other transactions, which were used as comparables, could not have been adopted. The Agreement as mentioned at Serial no.1 is captioned as a '*Non Compete Agreement'*. A Non-Compete Arrangement is clearly not similar to the transaction of purchase of hardware, which is the international transaction to be benchmarked. It is also noticed that the transaction at Serial no.3 is in relation to educational services, which admittedly is not similar to the international transactions being benchmarked. In the circumstances, this Court had called upon the learned counsel for the Revenue to explain the similarity between the transactions used as comparables and those that were to be benchmarked. However, the counsel fairly stated that he could not.

39. The assessee had selected a set of four comparable transactions and used the TNMM with OP/VAE (Operating Profit / Value Added Expenses) as well as Berry ratio (gross profit / value added expenses) as PLI's. The computation of the assessee's PLI is significantly higher than the mean PLI of the comparable entities. In addition, the assessee had also furnished benchmarking studies of other entities engaged in trading by deleting the value of stocks and working capital to corroborate that the international transactions were at ALP.

40. In view of the above, no substantial question of law arises in the present appeal.

41. The appeal is, accordingly, dismissed. The pending application is also disposed of.

**VIBHU BAKHRU, J**

**SWARANA KANTA SHARMA, J**

**OCTOBER 14, 2024**
**RK**

*Click here to check corrigendum, if any*