

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'C' BENCH, KOLKATA**

**Before Dr. Manish Borad, Accountant Member
&
Shri Anikesh Banerjee, Judicial Member**

**I.T.A. No. 381/KOL/2017
Assessment Year: 2012-2013**

***M/s. Linde India Limited,.....Appellant
(Formerly BOC India Limited),
"OXYGEN HOUSE",
P-43, Taratala Road,
Kolkata-700088
[PAN: AAACB2528H]***

-Vs.-

***Deputy Commissioner of Income Tax,.....Respondent
Circle-12(1), Kolkata***

Appearances by:

*Shri Ketan Kumar Ved, A.R. and Shri Amit Poddar, C.A.,
appeared on behalf of the assessee*

*Shri Rakesh Kumar Das, CIT (DR), appeared on behalf
of the Revenue*

Date of concluding the hearing :January 31, 2024

Date of pronouncing the order :February 19, 2024

O R D E R

Per Anikesh Banerjee, Judicial Member:-

The instant appeal of the assessee was filed against the order of Ld. Deputy Commissioner of Income Tax (Transfer Pricing) under section 143(3) read with section 144C of the Income Tax Act, 1961 (in brevity the 'Act') for assessment year

2012-13. The impugned order was emanated in pursuance to the direction of the Hon'ble Dispute Resolution Panel-2, New Delhi dated 22.11.2016.

2. The assessee has taken the following revised grounds of appeal:

"1. Order bad in law and on facts

1.1. For that the order dated 19 December 2016 (subsequently rectified vide Order u/s 154 dated 10 March 2017) passed by the Assessing Officer is arbitrary, erroneous, per se and contrary to law.

1.2. For that the Assessing Officer erred in making the reference under section 92CA of the Act to the Transfer Pricing Officer, without recording his objective satisfaction as prescribed under section 92CA and/or recording that any of the conditions prescribed in section 92C(3) of the Act, were satisfied.

1.3 For that the Hon'ble Dispute Resolution Panel ("DRP") erred in not holding that the order dated 29 January 2015 passed by Transfer Pricing Officer as well as the draft assessment order issued by the Assessing Officer (in so far it relates to transfer pricing proceedings) are void ab initio as none of the conditions of section 92C (3) of the Act or the condition of recording an objective satisfaction as required under section 92CA (1) have been satisfied.

2. Error in upholding the adjustment with respect to payment of Cylinder Rental Charges

2.1 For that the authorities below failed to consider and appreciate that in the instant case, the transfer pricing adjustment proposed by the Ld. TPO of INR 56,00,556/- in respect of cylinder rental charges is erroneous and contrary to law.

3. Erred in disregarding the economic analysis for purchase of fixed assets

3.1. For that the authorities below arbitrarily, erroneously and wrongly disregarded the principle of "Aggregation of Transactions" and also failed to consider and appreciate that

the computation of the arm's length price should have been made adopting the Transactional Net Margin Method (TNMM) as the fixed assets are deployed in the manufacture of industrial gases and are intrinsically linked to the overall business operations.

3.2. For that the authorities below erred in not appreciating the fact that operating profit of the Appellant is at arm's length, arrived at after considering the underlying depreciation on purchased fixed assets through the application of TNMM.

3.3. For that the authorities below erred in considering Return on Capital Employed ("ROCE") as the relevant Profit Level Indicator ("PLI") for benchmarking the transactions, and in doing so, erred in disregarded the commercial use of such assets in the Appellant's business operations.

3.4. For that further and in any event and without prejudice to the above:-

3.4.1. The appellant had no opportunity to deal with the TPO's ROCE since, he did not provide the computation of the ROCE margins at any stage of the proceedings in gross violation of the principle of natural justice; and

3.4.2. The authorities below wrongly determined the final set of companies resulting in inflated TP adjustmen”.

3. Brief facts of the case are that the assessee started operations in India in 1935 as the Indian Oxygen and Acetylene Company and is currently Headquarter in Kolkata. Erstwhile a part of the BOC Group, the assessee is a subsidiary of the BOC Group Limited, UK, the latter having a stake of 89.48% of equity capital. With the acquisition of the BOC Group by the Linde AG, Germany in 2006, the assessee has since evolved into a subsidiary of the Linde Group, bringing in international technology and safety standards, while catering to the needs of a wide variety of industries. Linde India is primarily engaged in the manufacture, storage and transmission of industrial gases as

well as execution of turnkey cryogenic/gas engineering and project design requirements. During the impugned assessment year, the assessee has a transaction with its AE. In its TP Study Report, the assessee has a selected TNMM as MAM and OP/Sales as PLI to benchmark its first six international transactions. During the impugned assessment year, the ld. TPO vide his order dated 29.01.2016 proposed transfer pricing adjustment. The matter travelled before the ITAT and Hon'ble ITAT passed the order but only the two issues, namely Cylinder Rental Charges amounting to Rs.56,00,556/- and purchase of Capital/Fixed Assets amounting to Rs.6,86,42,156/-, which were out of the focus of the Hon'ble Bench. The assessee filed a Miscellaneous Application bearing **M.A. No.56/KOL/2019** pointing out apparent errors in the aforesaid order passed on 06.11.2019 and the said Miscellaneous Application was recalling earlier order of the ITAT dated 19.09.2018 to extend the prudent of the following issues referring paragraph no. 3 thereof-

- (a) TP adjustment of Rs.56,00,556/- pertaining to international transaction of Cylinder Rental Charges paid and
- (b) TP adjustment of Rs.6,86,42,156/- pertaining to international transaction of import of Fixed Assets.

On specific direction of the fact, the appellant vide letter dated 28.01.2020 filed copies of the said revised grounds of appeal, which were accepted by the Bench.

4. The assessee had made transactions of Rs.2,81,28,919/- with AE towards Cylinder Rental Charges and other services. Since the international transaction was inextricably linked with other international transactions in its manufacturing segment, the assessee had benchmarked using the “aggregation approach” by applying the transaction under TNMM. The operating margin (OP Sales) of 13.07% earned by the appellant during the year under consideration from its manufacturing segment, which was higher than the operating margin (OP Sales-2) of 4.05% earned by its comparables. It was concluded in the T.P. Study Report that the international transactions in manufacturing segment (including the transaction of Cylinder Rental Charges) were at arm’s length. On Transfer Pricing during the year, the assessee’s transaction was studied and finally the adjustment was proposed amounting to Rs.56,00,556/-. In another case related to purchase of fixed assets, the assessee has also started TP Study and the method of aggregation was rejected by the ld. TPO and finally the proposal for the amount of Rs.6,86,42,156/- was accepted. Aggrieved, the assessee filed a petition before the Hon’ble DRP and the Hon’ble DRP has accepted the assessee’s submission. The grievance of the assessee was that the ld. TPO had used the same set of comparables for benchmarking the international transaction of purchase of fixed assets and rental of cylinders as he had used for the international transaction of purchase of raw materials and consumables and export of finished goods. The direction was made by the DRP but as per the assessee, the direction was not considered by the ld. TPO during the revised order. Accordingly section 144C(13) will be

applicable for deletion of the adjustment of the addition. The Hon'ble DRP has accepted the assessee's aggregation method and finally against the order of Id. Assessing Officer, the assessee was in appeal before us only for the two issues, which were directed by the Hon'ble ITAT in the order of Miscellaneous Application.

5. The Id. A.R. vehemently argued at the time of hearing before us and filed written submissions, which are kept in the record. The Id. TPO rejected the aggregation approach and held that the said transaction needs to be benchmarked separately. However, the Id. TPO applied the same set of comparables as was selected for the sale of goods and payment of cylinder charges, which are used for purchase of raw materials. The relevant paragraph of the observation of the Id. TPO at pages no. 150 to 151 of the paper book is reproduced as below: -

“37.1. In response to the rebuttal reasons put forward by the assessee, it is to be mentioned here that the companies that have been selected as comparable which are broadly functioning in the gas industry. The major condition for Transfer Pricing Analysis is comparability criteria, thus while price got affected when there are differences in products, gross margins are affected by differences in functions but net margins are comparatively less affected by the differences in products and functions. This does not mean that net margins are applicable to enterprise which carry similar functions in different market or different sectors of the economy. The sectoral and market similarity is the must for the applicability of net margin and this gives a leeway for comparison with a wide range of enterprise in the same sector and market. Net Profit indicators are less sensitive to the differences in the level of risks and extent and complexity of functions while doing a comparable analysis and hence as per the above criteria the companies selected as comparable are appropriate in the facts and circumstances of the case.

37.2. Accordingly, the ALP Margin of 21.43% (i.e., as computed in the SCN) stands effective, and shall be asunder:-

#	Comparable Companies	Operating Revenue	Operating Cost	Operating Profit	OP/OR	OP/OC
1	Bhagwati Oxygen Ltd	1,587.79	1,447.16	140.63	8.86%	9.72%
2	Gujarat Fluorochemicals Ltd	206,899.61	90,049.32	116,850.29	56.48%	129.76%
3	Inox Air Products Ltd	74,736.71	52,444.30	22,292.41	29.83%	42.51%
4	Notional Oxygen Ltd	7,320.47	7,202.91	117.51	5.06%	5.33%
5	National Peroxide Ltd	15,400.00	11,687.36	3,712.64	24.11%	31.77%
6	Ellenbarrie Industrial Gas Ltd	6,314.99	5,413.17	901.82	14.28%	16.66%
7	Bhuruka Gases Ltd	4,769.32	3,810.17	959.15	20.11%	25.17%
8	SRF Limited	120,524.51	62,978.18	57,546.33	47.75%	91.36%
9	Paushak Ltd	3,359.32	3,030.07	329.25	9.80%	10.87%
10	Southern Gases Ltd	2,142.05	2,029.40	112.65	5.26%	5.55%
11	India Glycols Ltd	234,790.13	201,230.58	33,559.55	14.29%	16.68%
	Average	6,177.71	49,865.69	21,502.02	21.43%	35.04%

37.3 The computation of the proposed adjustment to arm's length price shall be as under:

Particulars of the Tested Party	Reference	Amount (INR Million)
Operating Revenue	R	12,383.18
Operating Cost	C	10,764.89
Operating profit	P = R - C	1,618.29
Operating Margin	CM = P/C	15.03%
Arithmetic mean of Operating Margin of Comparable companies (OP/OR)	RM = P/R	13.07%
Arithmetic mean of Operating Margin of Comparable companies (OP/OC)	M (Rev)	21.44%
Difference In Arithmetic mean of Operating Margins of comparable & tested party	M (Cost)	35.04%
Absolute value of difference in margins	D (Rev) = M (Rev) - RM	8.37%
	D (Cost) = M (Cost) - CM	20.01%
	AV (Rev) = D (Rev) * R	1,036.47
	AV (Cost) = D (Cost) * C	2,154.06

#	Parameters	Reference	Purchase of Raw Materials & Consumables	Export of Finished Goods	Cylinder Rental Charges
1	Transaction proposed for Adjustment as per TP Documentation Report (INR)		18,25,41,451.28	21,70,81,321.41	2,81,28,918.87
2	% of the said Transaction to, either OC or OR (as applicable)	Either 10% OR, 10% OR	1.70%	1.75%	0.26%
3	Proposed Upward TP Adjustment on Differential Margin (INR)	Either 2AV (Rev) or 2AV (Cost)	3,66,19,020.00	4,81,38,225.00	56,00,596.00
				6,03,57,801.00	

6. In objection, Hon'ble Dispute Resolution Panel has taken the following action and rejected the Id. TPO's observation related to rejection of aggregation approach as adopted by the appellant and rejection of comparables of the Id. TPO. Accordingly the observation of the Hon'ble DRP is duly reproduced as below: -

"2. Principle of Rule of Consistency not applied by the Id. TPO

2.1. The Id. TPO erred in making a transfer pricing adjustment to the tune of INR 25,61,96,698.11 by completely disregarding the arm's length price determined by the assessee in respect of the following international transactions with the AEs'

S.N.	Category of International Transaction(2)	Adjustment (INR)
1.	Payment of Intra-group Services (IS Support Services)	7,66,62,259.46
2.	Payment of Intra-group Services (Accounting Centre of Excellence)	1,27,38,549.07

3.	<i>Purchase of raw materials & consumables</i>	3,66,19,020.00
4.	<i>Export of Finished Goods</i>	1,81,38,225.00
5.	<i>Payment of Cylinder Rental Charges</i>	56,00,556.00
6.	<i>Payment of Technical Assistance Fees (TAF)</i>	3,77,95,932.00
7.	<i>Purchase of Capital/Fixed Assets</i>	6,86,42,156.58
		25,61,96,698.11

2.2. *The TPO erred in not applying the Rule of Consistency during the transfer pricing proceedings without appreciating that the fact pattern of the case is same as the preceding years.*

2.3. *The TPO disregarded the Rule of Consistency during the transfer pricing proceedings and arbitrarily proceeded to evaluate the afore-stated transactions in the manner contrary to that in the earlier years without appreciating the fact that the assessee is having similar transactions in all the earlier years and there is no deviation in its nature and tenor as such.*

2.4. *The learned TPO erred in making a transfer pricing adjustment by disregarding the arm's length price as determined by the Assessee and, instead, proceeded to re-determine the same arbitrarily without any rhyme or reason and ignoring all the justification and evidences furnished in support thereto .*

“DRP Directions:

The assessee submits that it has been undertaking the covered international transactions with its AEs on a continuous basis in all the preceding years. The learned TPO in all these earlier years accepted the same to be at arm's length after examining the documentary evidence submitted for each of such transactions.

DRP has duly considered submissions of the assessee. It is settled principle of law that doctrine of resjudicata is not applicable to proceedings under IT Act. Application of TP provisions will depended facts and circumstances of the case. Therefore, objection of the assessee is dismissed.

3. Erroneous Rejection of the Transfer Pricing Documentation by the TPO

3.1. *The TPO erred in concluding that a transfer pricing adjustment of INR 25,61,96,698.11 needs to be made to the international transactions of the Assessee;*

3.2. *The TPO erred on facts and in law in rejecting the comparable companies arrived at in the Transfer Pricing Study without considering the functional and risk analysis of the Assessee;*

3.3. *The TPO erred in law and on facts in disregarding the application of multiple-year data while computing the margins of alleged comparable companies;*

Directions:

DRP has duly considered submissions of the assessee. It is seen that TPO has rejected economic analysis of the assessee after giving cogent reasons in para 34 of his order. Further, the issue regarding use of single year vs multiple year data has been decided by Hon'ble jurisdictional Delhi High Court in case of Chryscapital Investment Advisors (India) Pvt Ltd vs DCIT [2015-TII-13-HC-DEL-TP]. Accordingly, the action of the TPO is upheld.

4. *The learned TPO undertook wrong selection of comparables and erroneous bench-marking*

4.1. *The TPO erred on facts and in law in conducting a fresh search and selecting 6 additional /new comparables which are functionally dissimilar without adhering equitable consideration to the functional and risk analysis of the Assessee on the basis of which the existing comparable companies were arrived at in the Transfer Pricing Study, and consequently resorted to erroneous bench-marking and wrong Arm's Length;*

4.2. *The TPO erred on facts and resorted to rejecting 3 comparable companies (out of the 8 'comparable companies as illustrated in the Transfer Pricing Study), mentioned hereunder, citing arbitrary reasons that the said comparable companies are functionally not comparable to the assessee as also they have high incidence of fuel consumption*

a) Arrow Oxygen

b) Bombay Oxygen Corporation Limited

c) Refex Refrigerants Limited

4.3. *It would be amply evident from the Annual Reports of the comparable companies that the said three comparable companies are primarily engaged in the manufacture and sale of industrial gases and hence, ideally and genuinely comparable to that of the assessee.*

Moreover, power and fuel constitutes a critical component to the manufacturing process of industrial gases and a bare perusal of the related industry analysis of similar companies as also the annual Report of Linde India Limited would amply enunciate the fact that consumption of power and fuel is a critical pre-requisite of the said business process practiced globally. Accordingly, the rejection of the said 3 comparable companies by the TPO is contrary to the established principles of the technology practiced the world over and should be re-instated.

DRP Directions:

The TPO has rejected three companies as the assessee has taken multiple years data and has taken three years average of the data , the assessee has aggregated all the transactions and has applied TNMM on the aggregate .

On use of multiple year data, the Panel has taken consistent view that current year data should be used. The usage of single year data of contemporaneous period has been upheld in a number of judgments including Aztec Software Technology Ltd 294 ITR (AT) 32 SB Bangalore. The objection is therefore rejected. Rule 10B(4) very clearly states that the data of the comparable transactions should be the data pertaining to the financial year in which the taxpayer has entered into international transactions. The word used is “shall” and not “may”. It implies that neither the tax payernor the department has any choice regarding the use of relevant financial data. The issue regarding use of single year vs multiple year data has been decided by Hon’ble Jurisdictional Delhi High Court in case of Chryscapital Investment Advisors (India) Pvt Ltd –vs.- DCIT [2015-TII-13-DEL-TP]emphasizing the significance of single year data.

As far as aggregation of the transactions is concerned, each transaction should be individually 'benchmarked unless it is proved that all the transactions are interdependent and interlinked in such a way that they cannot be segregated. Hence, benchmarking of transactions separately is upheld.

International transactions identified by the TPO are as under:-

<i>S.N.</i>	<i>Transaction</i>	<i>Amount</i>	<i>Method applied by the assessee</i>	<i>PLI</i>
1.	<i>Purchase of raw material and consumables</i>	<i>182541,451.28</i>	<i>TNMM</i>	<i>Op/Sales</i>
2.	<i>Export of finished goods</i>	<i>217081,321.41</i>	<i>TNMM</i>	<i>Op/Sales</i>
3.	<i>Purchase of capital/fixed assets</i>	<i>867789,590.17</i>	<i>TNMM</i>	<i>Op/Sales</i>
4.	<i>Service fees for all IT/SAP related tasks and services</i>	<i>76662,259.46</i>	<i>TNMM</i>	<i>Op/Sales</i>
5.	<i>Cylinder Rental charges & other services</i>	<i>28128,918.87</i>	<i>TNMM</i>	<i>Op/Sales</i>
6.	<i>Accounting centre of Excellence serices (ACE-ROHQ)</i>	<i>12738,549.07</i>	<i>TNMM</i>	<i>Op/Sales</i>
7.	<i>Technical assistance fees</i>	<i>187041,097.00</i>	<i>CUP</i>	<i>Not applicable</i>
8.	<i>Interest paid/payable</i>	<i>384884,203.26</i>	<i>CUP</i>	<i>Not applicable</i>
9.	<i>Reimbursement of expenses</i>	<i>29389,533.17</i>	<i>CUP</i>	<i>Not applicable</i>
10.	<i>Recovery of expenses</i>	<i>40588,874.55</i>	<i>CUP</i>	<i>Not applicable</i>

7. The ld. A.R. argued that ld. TPO rejected the aggregation approach adopted by the appellant and held that the said transaction needs to be benchmarked separately. As per the ld. A.R., the ld. TPO applied the PLI of return on capital employed to benchmark the transaction of purchase of fixed assets. The ld. TPO applied the said set of comparables as was selected for manufacturing segment especially for purchase of raw materials and consumables and export of finished goods.

7.1. The Id. A.R. further argued that in objection filed before us by the Hon'ble DRP, the assessee challenged the following aspects of the impugned transfer pricing adjustment related to the payment of cylinder rental charges also. The action of the Id. TPO is duly rejected relating to aggregation approach adopted by the appellant and application of PLI as return and capital employed by Linde India's ROCE and the selection of comparables of the Id. TPO rejected by the Hon'ble DRP. Hon'ble DRP has made direction on 22.11.2016, which are reproduced as below:-

"5. Benchmarking of Purchase of Capital / Fixed Assets is to be considered at an Aggregated level

5.1. The TPO erred on facts and in law in conducting a fresh search and selecting 6 additional / new comparables which are functionally dissimilar without adhering equitable consideration to the functional and risk analysis of the Assessee enumerated in the Transfer Pricing Study for the 8 comparable companies arrived at, and consequently resorted to erroneous benchmarking and wrong ARM's Length;-

5.2. The TPO erred in arbitrarily rejecting 3 comparable companies (out of the existing 8 comparable companies) of the assessee on mere surmises and without any rational basis;

5.3. The TPO disregarded the principle of "Aggregation of Transactions" as enunciated in the TP Documentation Report and arbitrarily bench-marked the transactions of Export of Capital Assets with-out appreciating the fact that the said transactions are not alien to the manufacturing function of the assessee but are intrinsically linked to the other international transactions complimenting each other and contributing together as one.

DRP Directions:- The assessee submitted that the import/export of capital assets transaction should be

considered in aggregation and not in isolation. TPO arbitrarily rejected the approach of “aggregation of transactions” as also the application of TNMM and instead proposed application of ROCE. TPO accordingly determined the average ROCE at 15.77% and correspondingly held Linde India’s ROCE of 7.86% as non-compliant to the arm’s length requirement of the Indian TP regulations thereby proposing for an upward adjustment of INR 6.86 Crores.

DRP has considered the submissions of the assessee. Transaction of import/export of capital assets is an independent transaction which can be tested on standalone basis. There is no cogent reason to aggregate it transactions relating to manufacturing. Hence, DRP is not inclined to interfere with action of TPO/AO. The objection is dismissed.

8. The ld. D.R., on the other hand, vehemently argued by relying on the orders of revenue authorities and prayed that the order of Hon’ble DRP be upheld.

9. We have heard the rival contentions and perused the records placed before us. The ld. A.R. in his argument first pressed that the ld. TPO had not considered the direction of the Hon’ble DRP, so section 144C(13) will be applied for contravening the direction of the Hon’ble DRP. The ld. A.R. relied on the order of **ITAT, Mumbai ‘J’ Bench dated 29th June, 2021 in the case of Red Hat India Private Limited -vs.- DCIT, Circle-15(3)(1), Mumbai in ITA No. 7210/Mum/2018 for A.Y. 2014-15.** The other issues are already adjudicated by the ITAT, Kolkata. The entire adjustment is not being accepted for application of 144C(13). In our factual consideration, we find that the ld. TPO has passed the rectified order under section 92CA(3) read with

section 144C(5) dated 26.12.2016 in pursuance of the direction of the Hon'ble DRP dated 22.11.2016. We accordingly fully rely on the order of Hon'ble DRP. The method taken by the assessee, i.e. TNMM should be taken instead of ROCE and the aggregation method will be applicable for the TP Study. We further direct that the matter should be remitted back to the file of Id. TPO/AO for further adjudication on the two issues as directed above and the comparables should be taken by considering the Rule of Consistency. No such comparable is allowed in TP study related to the transaction of purchase of raw material and consumables and export of finished goods. The Id. TPO should follow the direction of Hon'ble DRP and the issue of purchase of fixed assets applicability of ROCE will not be accepted and Id. TPO should make a separate re-workings of the margin, vis-a-vis the international transaction of purchase of fixed assets pursuant to the rejection of comparables of DRP's direction as retained the original transfer pricing adjustment of Rs.6,86,42,156/- vis-a-vis impugned transaction of purchase of fixed assets. In our considered view, the matter is restored to the file of Id. TPO/AO for further calculation of TP adjustment by considering the direction of the Hon'ble DRP.

10. In the result, the appeal of the assessee bearing ITA No. 381/KOL/2017 is allowed for statistical purposes.

Order pronounced in the open Court on 19/02/2024.

Sd/-

Sd/-

(Manish Borad)
Accountant Member

(Anikesh Banerjee)
Judicial Member

Kolkata, the 19th day of February, 2024

*Copies to :(1)M/s. Linde India Limited,
(Formerly BOC India Limited),
"OXYGEN HOUSE",
P-43, Taratala Road, Kolkata-700088*

*(2) Deputy Commissioner of Income Tax,
Circle-12(1), Kolkata*

(3) Dispute Resolution Panel (DRP), New Delhi;

(4) The Departmental Representative;

*(5) Guard File
TRUE COPY*

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.