

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF JANUARY 2017

PRESENT

THE HON'BLE MR. JUSTICE JAYANT PATEL

AND

THE HON'BLE MR. JUSTICE P.S.DINESH KUMAR

I.T.A. NO.15/2016

C/W.

I.T.A. NO.712/2015

BETWEEN :

Fosroc Chemicals (India)
Private Limited,
No.38, 12th Cross, 3rd Floor,
PSRID, CBI Road,
Ganganagar North,
Bangalore – 560 032
Represented herein by its
Regional Vice President
Mr.R.Sai Krishnan.

...APPELLANT

(Common in both appeals)

(By Sri. T.Suryanarayana, Adv.)

AND :

1. The Deputy Commissioner
Of Income-tax, LTU,
JSS Towers, 100 Feet Ring Road,
Banashankari 3rd Stage,
Bangalore – 560 085.
2. The Commissioner
Of Income-tax, LTU,

JSS Towers, 100 Feet Ring Road,
Banashankari 3rd Stage,
Bangalore – 560 085.

...RESPONDENTS
(Common in both appeals)

(By Sri.K.V.Aravind, Adv.)

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I.T.A. No.15/2016 is filed under Section 260-A of Income Tax Act, 1961, arising out of order dated 14.08.2015 passed in MP No.47/Bang/2015 in ITA No.148/Bang/2014 (Annexure – H), for the Assessment Year 2009-2010.

I.T.A. No.712/2015 is filed under Section 260-A of Income Tax Act, 1961, arising out of order dated 10.04.2015 passed in ITA No.148/Bang/2014 (Annexure – M), for the Assessment Year 2009-2010.

These appeals coming on for *admission*, this day, **Jayant Patel J.**, delivered the following:

JUDGMENT

The assessee has preferred I.T.A. No.15/2016 by raising various questions. In our view, the only question that may arise is question No.1, which can be reformulated as under:

Whether the Tribunal could make any further observations exceeding the observations already made by the Tribunal in respect of the very assessee vide order dated 05.04.2013 in ITA(TP) No.1256(BNG.)/2011?

2. As such since the only question to be considered is relating to the further observations made by the Tribunal after having recorded a finding that the case is covered by the earlier decision of the Tribunal for the purpose of remand or not, we need not narrate the facts but in our considered view in order to examine the controversy and the question referred to hereinabove, the reasoning of the Tribunal so recorded in the order would be sufficient.

3. The perusal of the order passed by the Tribunal, which is impugned in I.T.A. No.712/2015 shows that the Tribunal after extracting its earlier decision in I.T.A. No.1256/2011, at para 32 has inter alia observed as under:

32. In fact in Assessee's own case the Tribunal on identical facts remanded the issue of determination of ALP to the TPO. The direction of the Tribunal has already been extracted in the earlier part of this order. The facts and circumstances are identical in the present assessment year and therefore the

order of the AO is set aside and the issue remanded to the TPO/AO with identical directions as was given in Assessee's own case in AY 07-08.

(Emphasis supplied)

4. Since the Tribunal after making the aforesaid observation, has further proceeded to express the view about mode and the manner in which a TPO/AO should exercise the power, the assessee is in the present appeal I.T.A. No.712/2015. We may also record that in I.T.A. No.712/2015 after the aforesaid order dated 10.04.2015 was passed by the Tribunal, a Misc. petition for rectification was preferred by the assessee being M.P. No.47/Bang/2015, which came to be dismissed by the Tribunal vide order dated 14th August, 2015 and hence, for challenging the legality and validity of the said subsequent order, separate I.T.A. No.15/2016 has been preferred.

5. As I.T.A. No.15/2016 is dependent upon the outcome of I.T.A. 712/2015, both are considered simultaneously.

6. We have heard Mr.T.Suryanarayana, learned counsel appearing for the assessee and Mr.Aravind, learned counsel appearing for the Revenue in both the matters.

7. As such in our view, the question need not detain us further inasmuch as it is well settled that the Tribunal would be bound by its earlier view more particularly in respect of the very same assessee. The second aspect is that if the Tribunal was to make any further observation or to make a departure from its earlier view, there should be valid reasons so recorded by the Tribunal. When we state for the valid reasons, it is with the clarification that if the observations are considered the power of the TPO/Assessing Officer after remand in a particular manner which may prejudice the rights of the assessee, then such observations are no valid reasons. Further, once the finding is recorded to remand with a particular direction, the Tribunal should refrain itself from making any observation with regard to

the mode and the manner in which the direction is to be complied with.

8. The learned counsel appearing for the assessee contended that the Tribunal ought to have ended after having found that the order of Assessing Officer deserved to be set-aside and the matter deserved to be remanded with the identical direction as was given in case of assessee's own case for the Assessment Year 2007-08. Whereas Mr.Aravind learned counsel appearing for the Revenue contended that the Tribunal has just elaborated about various aspects to be examined by the TPO/AO while complying with the direction of remand and therefore, there is no contradiction as sought to be canvassed in the order of the Tribunal vis-à-vis the earlier direction given by the Tribunal for the Assessment Year 2007-08. Therefore, it was submitted that this Court may dismiss the appeal by not interfering with that part of the order of the Tribunal, which is challenged in the appeal.

9. We may record that in the earlier order in respect of the very assessee for the Assessment Year 2007-08 the Tribunal itself has reproduced the directions, which are at para 17 of the impugned order. We need not reproduce the complete paragraph but the relevant portion of the earlier direction reads as under:

Since these findings of the TPO on the rendering of services and allocation of expenses are erroneous, we set aside the matter to the TPO with a direction to recompute the ALP by taking into consideration the allocated expenses by the AE to assessee. Further, it is also to be observed that the revenue authorities have to adopt a uniform and consistent approach in the case of the assessee on the same set of facts for each year. Though, the assessee has been receiving the services from its AE from the year 2003 onwards, the TPO has not made any transfer pricing adjustment till the AY: 2006-07 and even for the subsequent AY: 2008-09 where the assessee has received the services from its AE. Once the TPO has accepted the ALP computed by the assessee by virtue the very same licence agreement

dated 31.10.2003 (as per which the assessee has been receiving services year after year), it cannot take a contrary view only for the assessment year 2007-08 holding that the assessee is not receiving any services. In view of the same, we deem it fit and proper to remand the issue to the file of the TPO for recomputing of the ALP without insisting upon the quantification of each of the services received by the assessee and the commensurate benefit that has accrued to the assessee. The entire payment made by the assessee towards 'management services' shall be taken as the aggregate payment for all the services rendered by the AE. The TPO is also directed to again reconsider the issue on the adoption of the most appropriate method and shall arrive at the ALP before making the adjustment after taking the appropriate comparables, as even for computation of ALP by adopting CUP method, identifying comparables is essential."

10. The aforesaid observations made by the Tribunal if read with the observations made by the Tribunal in para 32 which are already reproduced earlier, it can be concluded that the Tribunal should

maintain the principle that the Revenue authorities had to adopt a uniform and consistent approach in the case of assessee on the same set of facts for each year. Further the Tribunal has also concluded that the facts and circumstances are identical in the present assessment year and therefore, the order of the Assessing Officer is set-aside and the issue remanded to TPO/AO with identical directions as was given to Assessee's own case for Assessment year 2007-08, deserved to be honoured. In our view it was not open to the Tribunal thereafter to control the power of TPO/AO after the remand at par with the remand order already made for Assessment Year 2007-08.

11. It is hardly required to be stated that in any judicial forum like Tribunal is to decide the matter or controversy, if it would express the view in respect of the subject, which is required to be decided and it shall not make any observation or expression for academic purpose. Once the Tribunal having found that the matter deserves to be remanded to TPO/AO with the

identical direction as was given in the case of the assessee for the Assessment Year 2007-08, the Tribunal ought to have ended there.

12. In our considered view any observation thereafter may not only control the power of the TPO/AO, but would also demonstrate the contradictory approach on the part of the Tribunal, which the Tribunal itself has not followed the advise raised in the earlier order for uniform approach of the Revenue.

13. The aforesaid is coupled with the circumstances that the Revenue being unsatisfied with the very order of the Tribunal in ITA(TP) No.1256(BNG.)/2011 dated 05.04.2013 had carried the matter before this Court in I.T.A.No.492/2015 and connected matters and this Court by order dated 22nd March, 2016 dismissed the appeal of the Revenue. We find it appropriate to record that this Court, in the aforesaid decision at paras 6 and 7 observed thus:

6. Mr.K.V.Aravind, learned Counsel appearing for the appellants contended that the comparable aspects of the quantum of the services rendered vis-à-vis the expenses incurred, is not left open by the Tribunal and the Tribunal has concluded the same and therefore, there is a valid grievance of the appellants-Revenue. He submitted that such an exercise is permissible under Section 92 of the Income Tax Act. He also relied upon the decision of Delhi High Court in the case of **Commissioner of Income Tax Vs. EKL Appliances Ltd** reported at **(2012) 81 CCH 0027 DelHC**, which was brought to the notice of the Tribunal, more particularly, by relying upon the observations made at paragraphs-39 and 40, he submitted that when the expenses are incurred in respect of the related concern, the scrutiny should have been left open by the Tribunal even while remanding the matter to TFO and therefore, the Tribunal has committed an error and this Court may consider substantial questions of law in the present appeals.

7. Even if we consider that under Section 92 of the Income Tax Act, such an exercise is

*available read with the decision of Delhi High Court in the case of **EKL Appliances Ltd** (supra) then also, the Tribunal after examining the record has found that the services rendered were concerning the business and once the nexus is found and the factual aspect is considered by the Tribunal, it cannot be said that the Tribunal ought to have remanded the matter by keeping that question once again open for consideration by the TPO. Further, the Tribunal has rightly considered and examined the decision of Delhi High Court in case of **EKL Appliances Ltd** (supra).*

The aforesaid observation would show that this Court had not accepted the contention of the Revenue that the Tribunal ought to have remanded the matter by keeping that question once again open for consideration by TPO.

14. In view of the aforesaid circumstances we do find that the further observations made by the Tribunal after recording the finding that matter is required to be remanded to TPO/AO with identical directions as was given in case of the assessee for Assessment Year 2007-

08, were not called for. The Tribunal, after having found that an identical direction deserved to be issued at par with the direction given for A.Y. 2007-08, the Tribunal ought to have ended the discussion with the same direction. Hence, the question needs to be answered in negative in favour of the assessee and against the Revenue. Resultantly the order passed by the Tribunal making observation exceeding the identical direction given in case of the assessee for the Assessment Year 2007-08 would no more operate. The TPO/AO will be required to consider this matter in the same manner as was considered earlier and is to be considered at par with the direction issued in case of the assessee for the Assessment Year 2007-08.

I.T.A. No.712/2015 shall stand ***disposed of*** accordingly.

15. In view of the order passed in I.T.A. No.712/2015, we find that no useful purpose would be served in further examining the question raised in I.T.A. No.15/2016 since the order for which

the rectification was sought, is partly modified by this Court in I.T.A. No. 712/2015. Hence, **I.T.A. No.15/2016** shall stand ***disposed of*** accordingly.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

SPS