

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 22ND DAY OF MARCH 2016

PRESENT

THE HON'BLE MR.JUSTICE JAYANT PATEL

AND

THE HON'BLE MRS.JUSTICE B.V.NAGARATHNA

ITA NO.492/2015 & ITA NO.642/2015

C/W

ITA NO.470/2013

ITA No.492/2015 & ITA No.642/2015

BETWEEN

1. THE COMMISSIONER OF INCOME-TAX
LTU
JSS TOWERS
BSK III STAGE
BANGALORE-560 085

2. THE DEPUTY COMMISSIONER OF INCOME-TAX
LTU
JSS TOWERS
BSK III STAGE
BANGALORE-560 085

...APPELLANTS

(BY SRI.K.V.ARAVIND, ADVOCATE)

AND

M/S FOSROC CHEMICALS INDIA PVT LTD
NO.38, 12TH CROSS
3RD FLOOR
“PSRID” CBI ROAD
GANGANAGAR NORTH
BANGALORE – 560 032
PAN: AAACF 2300D

...RESPONDENT

THESE APPEALS ARE FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED:10/04/2015 PASSED IN ITA NO. 148/BANG/2014 AND S.P.NO.107/BANG/2014, FOR THE ASSESSMENT YEAR 2009-2010 PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED ABOVE AND ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT, BANGALORE IN ITA NO.148/BANG/2014 AND S.P.NO. 107/BANG/2014 DATED:10/04/2015 AND CONFIRM THE ORDER OF THE DRP CONFIRMING THE ORDER PASSED BY THE DEPUTY COMMISSIONER OF INCOME TAX, LTU, BANGALORE.

ITA No.470/2013

BETWEEN

1. THE COMMISSIONER OF INCOME-TAX
LTU, JSS TOWERS
BSK III STAGE
BANGALORE

2. THE DEPUTY COMMISSIONER OF INCOME-TAX
 LTU
 JSS TOWERS
 BSK III STAGE
 BANGALORE-560 085

...APPELLANTS

(BY SRI.K.V.ARAVIND, ADVOCATE)

AND

M/S. FOSROC CHEMICALS INDIA PVT. LTD.,
 PSRID NO.38, 12TH CROSS
 3RD FLOOR, CBI ROAD
 GANGANAGAR NORTH
 BANGALORE-560 032

...RESPONDENT

THIS APPEAL IS FILED UNDER SEC.260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED: 05/04/13 PASSED IN IT(TP)A.1256/BANG/2011, FOR THE ASSESSMENT YEAR 2007-08, PRAYING TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW STATED THEREIN AND ALLOW THE APPEAL AND SET ASIDE THE ORDER PASSED BY THE ITAT, BANGALORE IN IT(TP)A NO.1256/BANG/2011 DATED 05/04/13 AND CONFIRM THE ORDER OF THE APPELLATE COMMISSIONER CONFIRMING THE ORDER PASSED BY THE DEPUTY COMMISSIONER OF INCOME TAX, LTU, BANGALORE.

THESE APPEALS COMING ON FOR ADMISSION THIS DAY, **JAYANT PATEL J.**, DELIVERED THE FOLLOWING:

JUDGMENT

The appellants-Revenue have preferred the present appeals by raising the following substantial questions of law in ITA Nos.492/15 and 642/2015:

1. “Whether on the facts and in the circumstances of the case, the Tribunal is right in law in setting aside the issue of transfer pricing to the file of the TPO for reconsidering the issue on the adoption of the most appropriate method and to arrive at the ALP after making the adjustment after taking the appropriate comparables, as even for computation of ALP by adopting CUP method, identifying comparables is essential by following its earlier which has not reached finality and when the TPO rightly held that the payment made by the assessee for technical and management cost of Rs.7,27,57,135/- to the AE was an independent international transaction which had to be analysed by applying CUP method prescribed by Rule 10B (1)(a) of the Act”?

Substantial questions of law in ITA No.470/2013

“1. Whether on the facts and in the circumstances and in law the Tribunal was correct in setting aside the determination of ALP on the International Transaction Payment of Technical Services Fees, directing the Transfer Pricing Officer to reconsider the issue on the most appropriate method and holding that the Transfer Pricing Officer cannot examine the payment commensurate to the volume and quality of services and recorded perverse finding?

2. Whether on the facts and in the circumstances and in law the Tribunal was correct in holding that the Transfer Pricing Officer is required to determine the ALP of the International transaction but cannot examine whether there was any international transaction between the assessee and the AE and recorded perverse finding?”

2. We have heard Mr.K.V.Aravind, learned Counsel appearing for the appellants.

3. It may be recorded that the Tribunal while considering the relevant aspects at paragraphs-9 and 10 has observed thus:

“9. Having heard both the parties and having considered the rival contentions and also the material on record, we find that the basic finding of the TPO is that the assessee has not received any services from its AE and also that the payments made by the assessee are not required to be made as provided in clause-9.2 of the licence agreement between the assessee and its AE. Let us first examine the second question i.e whether the licence agreement provides for making of any payment to the AE for the management services rendered by it or is it only required to reimburse the expenses of the personnel visiting the sites in India? As for as clause 9.2 of the licence agreement is

concerned, we find that it for the services rendered by the AE as enumerated in clause 6.2 and 6.7 of the licence agreement that the payments are to be made by the assessee and those payments shall also include the living expenses, travel expenses etc., The word 'including' used in this clause demonstrates that the payment is something over and above the expenses of travel, living etc., and that the payment for the services exceeding these expenses have to be agreed upon by the parties mutually. As far as the reimbursement of expenses are concerned, we have asked the assessee across the Bench whether the assessee has reimbursed the expenses and the learned counsel for the assessee submitted that the assessee has reimbursed the expenses and the TPO has not made any adjustment as far as the said reimbursement of the expenses is concerned. When the assessee has reimbursed the expenses of travel, living etc., of the personnel of the AE on their visit to India, then it is established that the AE

personnel have visited India and might have rendered their services to the assessee.

9.1 Now whether any services have been rendered by the AE to the assessee company is to be examined. The assessee has drawn our attention to pages 61 to 67 of the paper book which consists of the e-mails between the assessee and the personnel of the AE and also reports of the personnel of AE who have visited India which are at pages 61-523. We find that the TPO has brushed aside these documents perfunctorily stating that there are only the e-mails and are not evidence of the services rendered. We are of the opinion that the TPO ought to have considered the documents in proper perspective to see whether the assessee has received any services. The documents purportedly are advices given by the AE to the assessee on various issues concerning its business. As held by the Hon'ble Delhi High Court in the case of CIT Vs E.K.L Appliances Ltd (In ITA Nos.1068/2011 & 1070/2011.

whether or not to enter into a transaction is for the assessee to decide and the TPO can only examine and compute the quantum of ALP, but he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses and therefore, not gained any commensurate benefit there from. Similar view was expressed by the Bench of the Tribunal at Mumbai in the case of Dresser Rand India (P) Ltd., cited supra. Respectfully following the same, we hold that the TPO has no authority to hold that since the assessee has not been able to demonstrate commensurate benefit for the expenditure incurred by it, the ALP to be determined is nil. As the TPO has erred in appreciating clause 9.2 of the licence agreement and coming to erroneous conclusion with the said clause authorizes the assessee to only reimburse the expenses, we hold that the said clause requires the assessee to make the payment over and above the reimbursement of expenses.

Further, as regards the quantification of the expenses and the commensurate benefit is concerned, we hold that the TPO cannot go into the fact whether the assessee is actually benefited from such expenditure. As held by the Hon'ble Gujarat High Court in the case of Veer Gems (cited supra). The TPO is only required to determine the ALP of the International transactions, but cannot examine whether there was any international transaction between the assessee and its AE. This power is vested with the AO only. Having regard to the comparable cases, as far as quantification of the expenses is concerned, we find that as held by the Hon'ble Supreme Court of India in the case of M/s Consolidated Coffee Ltd., Vs State of Karnataka 248 ITR 432 (cited supra), has held that allocation of expenditure on the basis of turnover is justified. 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. In the result, the assessee's appeal is partly allowed for statistical purposes."

4. The aforesaid shows that the Tribunal while considering the matter has found that the incurring of the expenses and the reimbursement is established. Further, on the aspects of services rendered by the Associated Enterprises (AE for short) to the assessee-

Company is concerned, the Tribunal found that the voluminous record was produced from page Nos.61 to 523. The Tribunal after examining the said record, has noted the finding of fact which reads as under:

“The documents purportedly are advices given by the AE to the assessee on various issues concerning its business.”

5. Thereafter, the Tribunal has found it proper for the matter to be relegated to Transfer Pricing Officer (hereinafter referred to as ‘TPO’ for brevity) with a direction to recompute the ALP, taking into consideration the allocated expenses by Associated Enterprises to the assessee. Further, the Tribunal has also observed that the entire payment made by the assessee towards ‘management services’ shall be taken as the aggregate payment for all the services rendered by it and the matter is remanded for computation.

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 TPO 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).

8. As such, in our view, no substantial question of law arises for consideration, as sought to be canvassed. Hence the appeals are dismissed.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

JT/-