IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

IT(TP)A No.263/Bang/2016
Assessment year : 2011-12

M/s. Yaskawa India Pvt. Ltd., (formerly M/s. Yaskawa Electric India Pvt. Ltd.), No.17/A, 2nd Main, Electronic City Phase – 1, Hosur Road, Bengaluru – 560 100. **PAN: AAACY 4408P**	Vs.	The Income Tax Officer, Ward 7(1)(4), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Narendra Kumar Jain, CA
Respondent by	:	Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	18.03.2021
Date of Pronouncement	:	16.06.2021

O R D E R

Per Chandra Poojari, Accountant Member

This appeal is directed against the order dated 28.1.2016 of the AO passed u/s. 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [the Act], consequent to the directions of the DRP dated 23.11.2015 u/s. 144C(5) of the Act.

2. The assessee has raised the following grounds :-

"**Grounds Relating to Transfer Pricing-Legal Issues**

1. The learned Income Tax Officer, ward-7(1)(4), Bengaluru (hereinafter referred as "AO" for brevity), learned Additional Commissioner of Income Tax, (Transfer Pricing) 2(2), Bengaluru (hereinafter referred as "TPO" for brevity), and the Honourable Dispute Resolution Panel-2(hereinafter referred as "DRP" for brevity) ("AO", "TPO" and DRP collectively referred as "lower authorities" for brevity) have erred in passing the order which are bad in law

2. The learned AO has erred in passing the final assessment order without appreciating that he does not have jurisdiction over the Appellant. The Order passed without jurisdiction is bad in law and liable to be quashed.

3. The AO has erred in making reference to TPO for determining arm's length price without demonstrating as to why it was necessary and expedient to do so. The DRP has erred in confirming the action of the AO

4. The lower authorities have erred in:

a. Making transfer pricing adjustment of Rs. 1,28,52,493/-.

b. Passing the order without demonstrating that the Appellant had motive of tax evasion.

c. Not appreciating that there is no amendment to the definition of "income" and charging or computation provision relating to income under the head "Profits & Gains of Business or Profession" do not refer to or include the amounts computed under Chapter X' and therefore addition under Chapter X is bad in law;

d. Computing the TP adjustment atRs.1,28,52,493/- without giving the basis of computation of TP adjustment in the final assessment order.

Grounds Relating to Transfer Pricing

5. The lower authorities have erred in:

a. Rejecting Resale Price Method as the most appropriate method on unjustified grounds;

b. Rejecting comparables selected and TP documentation of the Appellant on unjustified grounds;

c. Selecting Transactional Net Margin Method as the most appropriate method which is inappropriate in the facts and circumstances of the case;

6. Assuming without admitting that Transaction Net Margin Method is to be selected as the most appropriate method, the lower authorities have erred in:

a. adopting inappropriate filters in the process of selecting comparables;

b. Adopting a profit level indicator of Operating profit/ Operating cost without appreciating that the operating cost consists purchases from AE;

c. Considering foreign exchange gain or loss as non-operating in nature;

d. Adopting companies as comparables even though they are not comparable in respect of functions performed, risks assumed, assets utilized, size, turnover, unusual business circumstances, high margins, etc.,

e. Rejecting K Dhandapani and Co Ltd as a comparable on unjustified ground;

f. Inappropriately computing the TP adjustment.

7. The lower tax authorities have erred in

a. Not providing adjustments for transactional and entity wide differences between the Appellant and the comparable; and

b. Not providing adjustment working capital differential and custom duty adjustment

8. The lower authorities have erred in ignoring the internal comparable submitted during the Assessment proceedings which demonstrate that the price charged by AE's was at arm's length

9. Assuming without admitting that the adjustment is to be made, the lower income tax authorities have erred in not allowing the benefit of the +/-5% range prescribed in the proviso to section 92C(2).

Corporate tax Grounds:-

10. The lower authorities have erred in

a. Holding that Rs.28,59,020/- paid to Ministry of Corporate Affairs towards fee for authorised capital is not in the nature covered u/s 35D;

b. Relying on the decision of M/s Brooke Bond India Ltd v CIT [1997] 91 TAXMAN 26 (SC) and Punjab State Industrial Development Corpn. Ltd. v CIT [1997] 93 TAXMAN 5 (SC) which were decided on different facts to hold that such fee is ineligible for deduction u/s 35D

c. Holding that date of obtaining VAT license is the date of set up without appreciating that date of incorporation was date of set-up in the Appellant's case; and

d. Disallowing Rs.70,17,913/- as pre-operative expenses.

11. The learned AO has erred in not granting the benefit under section 35D on legal expenditure incurred for incorporation which was inadvertently not claimed in the return of income filed by the Appellant.

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays accordingly."

3. Ground Nos. 1 to 9 which are related to TP issues are not pressed before us on the reason that these issues are settled under MAP proceedings. Accordingly, these grounds are dismissed as not pressed.

4. With reference to ground No. 10(a), the facts are that the assessee claimed Rs.5,71,804 as preliminary expenditure incurred towards ROC fees for authorised share capital. This was considered as capital expenditure by the AO in view of the judgment of the Supreme Court in the case of *Punjab State Industrial Development Corporation, 225 ITR 792 (SC)* and *Brooke Bond India, 225 ITR 798 (SC)*. According to the AO, this expenditure is not in the nature covered u/s. 35D of the Act. Against this, the assessee is in appeal before us.

5. The ld. AR relied on the judgment of Hon'ble jurisdictional High Court in the case of *CIT v. Buhler India Ltd. , 20 taxamann.com 191 (Karnataka)* wherein it was held that deduction u/s. 35 is allowable in respect of fees paid to ROC and expenses on public subscription shares. It was submitted by the ld. DR that the judgment relied on by the assessee's counsel relates to AY 1969 where at that time there was no section 35D in the statute book which was introduced w.e.f. 1.4.1971 by Taxation Laws (Amendment) Act, 1970. Being so, once section 35D is introduced, fee paid to ROC before its commencement for registering company under the provisions of the Companies Act, 1956 is eligible for deduction u/s. 35D of the Act. In the present case, the assessee claimed $1/5^{th}$ of total expenditure of Rs.28,59,020 i.e., Rs.5,71,804. Accordingly, the same has to be allowed as deduction u/s. 35D of the Act. This ground of the assessee is allowed.

6. Next ground is with regard to disallowance of Rs.70,17,913 being pre-operative expenses on the reason that date on which VAT license was

obtained was the date of commencement of business and not the date of incorporation.

7. The assessee was incorporated on 30.8.2010 and obtained PAN on 30.8.2010. The first board meeting of company was held on 30.8.2010. First GM was appointed on 1.9.2010. Equity capital was introduced on 15.9.2010. First Purchase Order was placed on YEC, Japan on 6.10.2010. Rent receipt from Regus Centre Services (Bangalore) Pvt. Ltd. for renting of office space at S 306, South Block, Manipal Centre, Dickenson Road, Bangalore was received on 10.10.2010. Key Management Personnel were appointed on 2.11.2010. Import/Export Certificate was obtained on 23.11.2010. Import invoice receive from YEC, Japan for import of goods in accordance with the first Purchase Order on YEC was received on 07.12.2010. The assessee pleaded before the AO that date of incorporation is the date of commencement of business to allow expenditure as revenue expenditure. However, the AO observed that assessee obtained Import License on 23.11.2010 and expenditure incurred only after obtaining VAT license on 24.12.2010 could be considered as allowable expenditure. This is so because even if the assessee had import license without the VAT registration, it will not be ready to perform sale in India. Thus the AO disallowed Rs.70,17,913 being the expenditure incurred before getting the VAT registration. Against this, the assessee is in appeal before us.

8. The ld. AR submitted that business has been set up by the assessee when it was ready to commence its business. According to him, since incorporation of company is over, the assessee is ready to commence the business. As such, all expenditure incurred from the date of incorporation is to be allowed as business expenditure. He relied on the judgment of the Supreme Court in the case of *CIT v. Ramaraju Surgical Cotton Mills Ltd., 63 ITR 478 (SC)* and Delhi High Court judgment in *CIT v. ESPN Software*

India (P.) Ltd., 301 ITR 368 (Del) for the proposition that where the business consists of continuous course of activities, for commencement of business all the activities which go to make up the business need not be started simultaneously. As soon as an activity which is the essential activity in the course of carrying on the business is started, the business must be said to have commenced. Further, he relied on the judgment of the Hon'ble Delhi High Court in the case of *Carefour WC & C India (P.) Ltd., 53 taxmann.com 289 (Del)* wherein it was held as follows:-

> "The present assessee was engaged and incorporated for carrying on trading activities in different commodities.
>
> The word 'trade' even though not defined in the Act is used to denote operations of a commercial character by which a trader provides to customer for reward, some kind of goods or services. In other words, when the trader starts providing such goods and services, the business is said to have commenced but the same may not hold good for set up of a business, which is a stage before the commencement. To set up a business, the following activities become relevant: —
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>> 'Preparation of a business plan; establishment of a business premises; research into the likely markets or profitability of the business; acquiring assets for use in the business; registration as an entity and under the local laws, etc.' The said list of activities is not exhaustive and facts of each case need to be considered. Indeed purchase of goods would amount to commencement of business, but before the said act, spade work and efforts to commence have to be undertaken. A trader before actual purchase would possibly interact and negotiate with manufacturers, landlords, conduct due diligence to identify prospective customers, spread awareness, etc. These are all integral part and parcel of the business of a trader. The said activities continue even post first sale/purchase. When first steps are taken by a trader, the business is set up, commencement of purchase and then sales is post set up. "

9. Thus the ld. AR submitted that once the assessee got incorporated under the Companies Act, the company is at liberty to commence business. Getting the Import Code Number or VAT Registration is only formality so as to comply with the requirements of specific laws and non-obtaining of these licenses does not disentitle the assessee to claim business expenditure as deduction.

10. On the other hand, the ld. DR submitted that assessee being a trading company, it cannot import any goods without Import Code/license or cannot sell any goods without registration. These are pre-conditions to start business which are not obtained by the assessee, as such the AO disallowed the expenditure since the assessee has not set up the business.

11. We have heard both the parties and perused the material on record. In this case, the reason for not allowing expenses is that the assessee has not set up business and business was set up only from the date of obtaining VAT registration. As seen from the facts of the case, the assessee was incorporated under the Companies Act on 30.8.2010 and made all arrangements to start the business from the date of introducing the capital on 15.9.2010 and took the premises for operation of its business from 10.10.2010. Key management personnel were also appointed on 2.11.2010. Import/Export license was obtained on 23.11.201. First Purchase Order was placed on YEC Japan in order to purchase goods on 6.10.2010 0 and VAT registration was obtained on 24.12.2010. All these things suggest that the assessee was ready to start its business and in our opinion, it is not necessary or mandatory to obtain registration so as to say that the company has set up its business. Based on the reason of not obtaining VAT certificate, it will not lead to conclusion that business was not set up, though purchase of goods would amount to commencement of business under the said Act, there are various activities to be commenced to carry the activities by the assessee. All the activities are integral part of

business of assessee and they are continued activities. When the first steps are taken by the assessee, business is said to be set up, based on which commencement of purchase and sales activities will start. In view of these facts, we are of the opinion that the business is said to be commenced from the date of placing purchase order i.e., on 6.10.2010 and all expenditure incurred from this date i.e., 6.10.2010 to be considered as business expenditure and to be allowed accordingly. This ground of assessee is partly allowed.

12. Ground No.11 reads as under:-

> "11. The learned AO has erred in not granting the benefit under section 35D on legal expenditure incurred for incorporation which was inadvertently not claimed in the return of income filed by the Appellant."

13. This ground of assessee is allowed as discussed in ground No.10(a).

14. In the result, the assessee's appeal is partly allowed.

Pronounced in the open court on this 16th day of June, 2021.

Sd/-	Sd/-
(N V VASUDEVAN)	(CHANDRA POOJARI)
VICE PRESIDENT	ACCOUNTANT MEMBER

Bangalore,
Dated, the 16th June, 2021.
/*Desai S Murthy* /

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.