

**आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, K, मुंबई ।**

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "K", MUMBAI**

**Before Shri Mahavir Singh, Judicial Member, and  
Shri Ashwani Taneja, Accountant Member**

**ITA NO.963/Mum/2015  
Assessment Year: 2010-11**

Kashikey Diamonds India P. Ltd., 610/1611, Prasad Chamber, Opera House, Mumbai-400004	<b>बनाम/ Vs.</b>	ITO 5(2)(2) Mumbai-
(Assessee)		(Revenue)
P.A. No.AACCK3666P		

निर्धारिती की ओर से / Assessee by	Shri Mayur Kisnadwala & Shri Keyur Khami (AR)
राजस्व की ओर से / Revenue by	Shri N.K. Chand (CIT-DR)

सुनवाई की तारीख / <b>Date of Hearing :</b>	<b>07/04/2016</b>
आदेश की तारीख / <b>Date of Order:</b>	<b>22/04/2016</b>

**आदेश / O R D E R**

**Per Ashwani Taneja (Accountant Member):**

This appeal has been filed by the assessee against the final assessment order dated 27<sup>th</sup> February, 2014, passed in pursuance to the directions given by the Dispute Resolution Panel (in short referred to as "DRP") vide its order dated 14.11.2014, for A.Y. 2010-11 on the following grounds: –

*“Aggrieved by the order of the Assessing Officer/Transfer Pricing Officer (following the directions given by Hon'ble Dispute Resolution Panel —I (DRP)), your appellant prefers an appeal against the same on following grounds, which it is prayed may be considered without prejudice to one another:*

- (1) On the facts and circumstances of the case and in law, the AO/TPO (following the directions of Hon'ble DRP) erred in making Upward transfer pricing adjustment Rs.38,20,727/-.*
- (2) (2) On the facts and circumstances of the case and in law, the AO/TPO (following the directions of Hon'ble DRP) erred in making adacddition10 % of Sales Promotion Expenses of Rs.48,831/-.*
- (3) On the facts and circumstances of the case and in law, the AO/TPO (following the directions of Hon'ble DRP) erred in making ad-hoc addition of 10% of Foreign Travelling Expenses of Rs.90,766/-“*

**2.** During the course of hearing, arguments were made by Shri Mayur Kisandwala & Shri Keyur Khami, Authorised Representative (AR) on behalf of the Assessee and by Shri N.K. Chand, Departmental Representative (CIT-DR) on behalf of the Revenue.

**3. Ground No.1:** In this ground, the assessee has challenged the upward transfer pricing adjustment Rs.38,20,727/-.

**3.1.** During the course of hearing, it has been stated at the very outset by the Ld. Counsel that Arms Length Price (in short ALP) determined by the Transfer Pricing Officer (in short TPO) falls within the range of (+/-) 5%, and therefore, without prejudice to his other submissions, even if the ALP determined by the TPO is accepted no adjustment was possible under the

law, in view of specific and clear provisions of second proviso to sub-section (2) of section 92C. In response, the Ld. CIT-DR was not able to negate the fact stated by the Ld. Counsel of the assessee.

**3.2.** In view of the above submissions, before deciding other issues, we find it appropriate to decide the preliminary issue as raised above.

**3.3.** The brief facts are that the assessee is 100% subsidiary of its AE i.e. Kashikey Co. Ltd. Japan. The Assessee is engaged in the business of trading of cut and polished diamonds. It has made 99.61% of its sale to its aforesaid AE holding company. Thus, the international transaction benchmarked during the course of transfer pricing proceedings was sale of goods to the AE. The business model of the assessee was that it procured diamonds from local suppliers as per the buyer's confirmed requirements and according to their specifications. The assessee adopted Profit Level Indicator (PLI) as PBDITA/sales which was changed by the TPO to OP/OC and carried out a fresh search of all the comparables. The TPO computed Arm's Length mean margin (taking OP/OC as PLI) at 1.80% as against assessee's margin of 0.41% and accordingly, he made an adjustment u/s 92CA of Rs.33,61,273/-.

**3.4.** During the course of proceedings before us, Ld. Counsel of the assessee submitted a chart showing that sales of the assessee was Rs.24,18,18,184/- and its 105% is equal to Rs.25,39,09,093/-. On the other hand, ALP computed by the

TPO is Rs.24,56,38,911/-. It is thus noted that the ALP determined by the TPO is less than 105% of the actual amount of the transaction. Under these circumstances, as per second proviso to sub-section (2) of section 92C, the price at which the international transactions has actually been undertaken, shall be deemed to be the ALP. No contrary facts or legal position was brought out before us by the Ld. CIT-DR. Under these circumstances, we find that no transfer pricing adjustment was called for, and therefore, the addition made by the TPO/AO is directed to be deleted. Since we have decided this issue on the preliminary ground itself, other issues raised by the assessee by way of written note submitted by him, are not being decided. Accordingly, this ground may be treated as partly allowed.

**4. Ground No.2 & 3:** These grounds have not been pressed by the Ld. Counsel during the course of hearing for the reason that amount involved in these two grounds are not material. Accordingly, these grounds are dismissed.

**5.** In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 22<sup>nd</sup> April, 2016.

Sd/-  
(Mahavir Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-  
(Ashwani Taneja)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 22/04/2016

*Patel, P.S.* नि.स.

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,  
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)**

**आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**