

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI A.K. GARODIA, ACCOUNTANT MEMBER

IT(TP)A No.188/Bang/2015, IT(TP)A Nos. 87 & 88/Bang/2016
Assessment years : 2010-11, 2007-08 & 2011-12

M/s. Fosroc Chemicals (India) Pvt. Ltd., # 38, 12 th Cross, III Floor, 'PSIRD' CBI Road, Ganganagar North, Bangalore – 560 032. PAN: AAACF 2300D	Vs.	The Deputy Commissioner of Income Tax, Large Taxpayer Unit, Circle 1, Bangalore.
APPELLANT		RESPONDENT

IT(TP)A No.295/Bang/2015,
Assessment year : 2010-11

The Assistant Commissioner of Income Tax, Large Taxpayer Unit, Bangalore.	Vs.	M/s. Fosroc Chemicals (India) Pvt. Ltd., Bangalore – 560 032. PAN: AAACF 2300D
APPELLANT		RESPONDENT

Assessee by	:	Shri S. Ramasubramanian, CA
Revenue by	:	Miss Neera Malhotra, CIT(DR)

Date of hearing	:	25.08.2016
Date of Pronouncement	:	17.10.2016

ORDER

Per A.K. Garodia, Accountant Member

Out of four appeals, two appeals are filed by the assessee for the assessment years 2007-08 and 2011-12 and remaining two appeals are for assessment year 2010-11 which are cross appeals filed by the assessee and

revenue. All these were heard together and are being disposed of by way of this common order for the sake of convenience.

2. The grounds raised by the assessee in ITA No.87/Bang/2016 are as under:-

- “1. That the order of the learned assessing officer in so far it is prejudicial to the interests of the appellant is bad and erroneous in law and against the facts and circumstances of the case.
2. That the Hon'ble Dispute Resolution Panel erred in law and on facts in holding that it has no jurisdiction to entertain the objection u/s 144C of the Act against the draft assessment order passed in consequence of the directions given by the Hon 'ble Tribunal earlier.
3. That the Honble Transfer Pricing Officer (TPO) erred in law and on facts in passing the consequential order without giving an opportunity to the appellant while passing the consequential order u/s 92CA of the Act.
4. That the learned TPO erred in law and on facts in holding that the appellant has to establish that the payments made were commensurate to the volume and quality of service and cost and commensurate benefits were derived and such finding of the learned TPO is contrary to the clear directions of the Hon'ble Tribunal in ITA (TP) 1256/Bang/2011.
5. That the learned lower authorities erred in law and on facts in holding that the appellant should demonstrate that it has received the benefit form various services. should furnish a cost benefit analysis to justify the price paid for the international transaction and that such services are necessary.
6. That the learned lower authorities erred in law and on facts in holding that the TNMM is not most appropriate method but the CUP method is most appropriate method even though the service transactions are integrally connected with manufacturing business of the appellant.
7. That the learned lower authorities erred in law and on facts in not determining the ALP even under CUP method by following the procedure under rule 10B (1) (a) of Income-tax Rules. 1962.
8. That the learned lower authorities erred in law and on facts in adopting a hypothetical CUP for determining the ALP of the services received.

9. That the learned lower authorities erred in law and on facts in determining the ALP as nil on the ground in a hypothetical situation, no third party would make payment for these kind of services.
10. That the learned assessing officer erred in law and on facts in levying interest u/s 234D on Rs.78,61,430 Instead of Rs.77,34,386.
11. That the learned assessing officer erred in law and on facts in holding that a sum of Rs. 50,51,711 has been received on 17.03.2010 and such a finding is perverse as the appellant has not received the above sum.
12. That the learned assessing officer erred in law and on facts in holding interest u/s 234D of the Act on a sum of Rs. 50,51,711 even though the appellant has not received the refund at all.
13. That the learned assessing officer erred in law and on facts in levying interest u/s 220(2) of the Act even though the demand raised in the original assessment order does not survive once the Hon'ble Tribunal has set aside such assessment.

Each of the above grounds is without prejudice to one another and the appellant craves leave of the Hon'ble Income Tax Appellate Tribunal, Bangalore to add, delete, amend or otherwise modify one or more of the above grounds either before or the time of hearing of this appeal.”

3. Ground No. 1 is general and no separate adjudication is called for. Regarding ground No.2, it was submitted by the Id. AR of assessee that DRP should have decided the issue on merit and it is not correct on the part of DRP to say that DRP has no jurisdiction to decide the matter arising out of draft assessment order passed in consequence to the directions of Tribunal u/s. 254.
4. Regarding ground No.3, it was submitted that the TPO should have provided opportunity of being heard to the assessee before passing consequential order u/s. 92CA as per the directions of DRP.
5. The Id. DR of revenue supported the orders of authorities below.

6. We have considered the rival submissions. First of all, we reproduce the provisions of section 144C from where the DRP gets the power and jurisdiction.

These are as under:-

“**144C.** (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,—

(a) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with,—

(i) the Dispute Resolution Panel; and

(ii) the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if—

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2).”

7. From sub-section (1) of section 144C, it is seen that in this sub-section, the words “first instance” has been used and the DRP has drawn conclusion from these words that they have to decide only a dispute arising out of draft assessment order passed originally and not out of draft assessment order passed as per direction of Tribunal but the same is misconceived because as per the scheme of this section, the AO shall pass draft assessment order at the first instance and forward the same to the assessee and within 30 days of receipt of draft order, the assessee can file his

acceptance of the draft order or he may file objections with DRP or with the AO and the AO shall complete the assessment on the basis of draft assessment order, if the assessee intimates to the AO that the draft assessment order is acceptable to the assessee and if no objections are received within the period specified under sub-section (2) of section 144C. Hence these words "first instance" is not with this purpose that the DRP will get jurisdiction only against the original draft assessment order and not against the draft assessment order passed as per direction of the Tribunal. Hence on this aspect, we reverse the order of DRP and hold that DRP should have decided the issue on merits instead of saying that DRP has no jurisdiction when the draft assessment order is passed by the A. O. on the set aside of earlier order by the Tribunal. Ideally in this situation, we should have restored back the matter to the file of DRP for decision on merits but in view of the ground No.3 of assessee's appeal and as per the order passed by the TPO u/s. 92CA, we find that the TPO has passed the order without giving any opportunity of being heard to the assessee.

8. We find that in the order of TPO dated 30.01.2015, the TPO has reproduced the directions of the Tribunal and thereafter, he has stated that accordingly this order is being passed and he has passed the order on various issues such as Most Appropriate Method, variables, determination of ALP and there is no whisper in this order of TPO that any opportunity of being heard was provided by him to the assessee. Hence, we feel it proper that this matter should go back to the file of TPO for fresh decision after providing reasonable opportunity of being heard to the assessee. We order accordingly.

9. In view of our above decision, the other grounds raised by the assessee do not call for any adjudication at this stage.

10. In the result, the appeal of assessee is allowed for statistical purposes.

11. Now we take up the remaining two appeals of assessee for the AYs 2010-11 and 2011-12. In both these years, grounds No.1 to 5 are identical and therefore, these grounds are reproduced below from assessee's appeal for AY 2011-12 i.e.

IT(TP)A No.88/Bang/2016:-

“1. That the order of the learned lower authorities in so far it is prejudicial to the interests of the appellant is bad and erroneous in law and against the facts and circumstances of the case.

2. That the learned lower authorities erred in law and on facts in holding that the appellant has not received the services from its Associated Enterprise and such a finding is perverse as being contrary to materials on record and not supported by any evidence on record.

3. That the learned lower authorities erred in law and on facts in holding that the appellant should demonstrate that it has received the benefit form various services, should furnish a cost benefit analysis to justify the price paid for the international transaction and that such services are necessary.

4. That the learned lower authorities erred in law and on facts in holding that the TNMM is not most appropriate method but the CUP method is most appropriate method even though the service transactions are integrally connected with manufacturing business of the appellant.

5. That the learned lower authorities erred in law and on facts in not determining the ALP even under CUP method by following the procedure under rule 1 OB(1)(a) of Income-tax Rules. 1962.

12. In this regard, it was submitted by the Id. AR of assessee that as per Tribunal's order in AY 2007-08 in ITA No.1256/Bang/2015 dated 5.4.2013, copy available on pages 1 to 13 of PB, the Tribunal restored the

matter back to the file of TPO with a direction to again reconsider the issue of the adoption of Most Appropriate Method and shall arrive at ALP before making adjustment after taking appropriate comparables as even for computation of ALP by adopting CUP method, decision of comparables is essential. It is submitted that accordingly in the present two years also, entire matter in connection with the TP issue should be restored back to the file of TPO for fresh decision with similar directions.

13. The Id. DR supported the orders of authorities below.

14. We have considered the rival submissions. We find that in the present two years, the main objection of the TPO is that the assessee has not shown that the allied services received from the AE are required for the assessee's business and also that the assessee is not capable of getting these services locally or on its own. Thereafter, the TPO concluded that the assessee did not show as to what is tangible and substantial commercial benefit derived by the assessee from the allied services and consequent payment of technical and management cost and on this basis, he disallowed the entire payment.

15. For the AY 2007-08, similar issue was before the Tribunal and as per the Tribunal order for AY 2007-08 (copy available in Paperbook), this issue was decided by the Tribunal vide para 9.1, which is reproduced below for the sake of ready reference:-

“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 is 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 authorises 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 transaction, 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.”

16. Respectfully following this Tribunal order, in the present two years also, we decide the issue on similar line and restore this matter back to TPO for a fresh decision with the same directions as was given by the Tribunal in AY 2007-08. Accordingly, these grounds are allowed for statistical purposes.

17. Thereafter, it was submitted by the Id. DR of revenue that grounds raised by the revenue in its appeal for AY 2010-11 and ground No.9 to 10 of the assessee's appeal in AY 2010-11 are on the same issue i.e., regarding payment of royalty for Rudrapur unit. In this regard, the Id. DR of revenue supported the assessment order whereas the Id. AR of assessee supported the order of Id. CIT (Appeals) for AY 2010-11. It was also submitted that on page 108 of PB is a letter regarding royalty waiver. Therefore, direction of DRP in AY 2010-11 should be upheld on this account.

18. We have considered the rival submissions. We find that the assessee is paying royalty @ 8% on exports and 5% for sale within India

as per the license agreement dated 31.10.2003. Subsequently, the principal agreed to waive royalty in respect of Rudrapur plant of the assessee w.e.f. 1st April, 2007. It is not the case of the AO or the TPO that the royalty rate of other units excluding Rudrapur unit has been increased on waiver of royalty for Rudrapur unit. It is also not the case of AO/TPO that sales from Rudrapur unit was also included to compute royalty payable to the principal. Under these facts, in our considered opinion, no part of royalty payment can be considered as royalty of Rudrapur unit and therefore, the action of AO/TPO to apportion part of royalty payment to Rudrapur unit is not valid and proper. We hold accordingly and appeal of Revenue for AY 2010-11 is dismissed and ground Nos. 9 & 10 of assessee's appeal for AY 2011-12 are allowed.

19. Regarding ground No.11 of assessee's appeal for AY 2011-12, the Id. AR of assessee reiterated the same contentions which were raised before DRP. The Id. DR supported the orders of authorities below.

20. We have considered the rival submissions. We find that it is noted by DRP on page 9 of its order that assessee has provided sample copy of invoice regarding addition to fixed assets. Hence it is seen that even before DRP, full details and supporting invoices regarding claim of addition to fixed assets were not furnished. Hence on this issue, we find no reason to interfere in the order of AO/TPO. Accordingly ground Nos. 11 of assessee's appeal is rejected.

21. In the result, appeal of assessee for AY 2010-11 is allowed for

statistical purpose and for AY 2011-12 is partly allowed for statistical purposes and appeal of revenue for AY 2010-11 is dismissed.

22. In the combined result, appeal of assessee for AY 2007-08 & 2010-11 are allowed for statistical purposes, for AY 2011-12 is partly allowed for statistical and appeal of revenue for AY 2010-11 is dismissed.

Pronounced in the open court on this 17th day of October, 2016.

Sd/-

(SUNIL KUMAR YADAV)
Judicial Member

Sd/-

(A.K. GARODIA)
Accountant Member

Bangalore,
Dated, the 17th October, 2016.

/D S/

Copy to:

1. Appellant
2. Respondents
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.