

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI**

**श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष**

**BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI D.S.SUNDER SINGH, ACCOUNTANT MEMBER**

**आयकर अपील सं./ITA No.1618/Mds/2015 & ITA No.1619/Mds/2015
निर्धारण वर्ष /Assessment Years: 2007-08 & 2009-10**

M/s.Tamilnadu Petroproducts Ltd.,
Manali Express Highway,
Manali,
Chennai-600 068.

Vs. The Dy. Commissioner of –
Income Tax,
Large Taxpayer Unit,
Chennai.

**[PAN: AACT 1295 M]
(अपीलार्थी/Appellant)**

(प्रत्यर्थी/Respondent)

Assessee by : Mr.R.Vijayaraghavan, Adv.
Revenue by : Mr.R. Duraipandian, Sr.AR.
सुनवाई की तारीख/Date of Hearing : 08.12.2016
घोषणा की तारीख /Date of Pronouncement : 29.12.2016

आदेश / O R D E R

PER D.S.SUNDER SINGH, ACCOUNTANT MEMBER

1.0 These appeals are filed by assessee against the order of CIT(A)-17, Chennai, for the AY 2007-08 in ITA No.72/10-11/LTU(A) dated 10.02.2015 and in ITA No.42/12-13/LTU(A) dated 10.02.2015 for the AY 2009-10. Both the appeals are related to the common issue of addition made u/s.92CA r.w. Rule 10B(1) of Income Tax Act.

2.0 The assessee is a public Limited company, filed its return of income declaring total income of Rs.(-)114 lakhs for the AY 2007-08. During the assessment proceedings, the AO made reference to the TPO for determining the Arm's Length Price (ALP) in respect of the international transaction. The assessee company engaged in manufacturing of Linear Alkyl Benzene (LAB) and has wholly owned subsidiary company by name M/s.Certus Investment & Trading Limited (CITL) in the republic of Mauritius. During the previous year relevant to the AY, the assessee company made sales of 4562.81 Mts. of LAB to its AE(CITL) for Rs.23,45,89,364/-, which resulted in international transaction.

3.0 The assessee company has adopted CUP method for determining the ALP of international transaction. The TPO also accepted the CUP method for determining the international transaction. The assessee company as per Form No.3CEB has adopted comparable price at US\$1135 for all the three months i.e July-2006, December-2006 and March-2007 on the basis of external comparables. During the above period, company also had internal transaction with non-AE. The TPO examined the comparables of internal and external transactions for determining the Arm's Length Price of the export sales to A.E and determined ALP of A.E sales at Rs.24,66,95,343/- adopting internal comparables against the sales declared by the assessee amounting to Rs.23,45,89,364/- thereby suggesting for upward adjustment of Rs.1,21,05,979/-. Subsequently,

the assessee filed the rectification petition u/s.154 before TPO and the TPO has passed modification Order u/s.92CA vide order dated 21.01.2011 determining upward revision of adjustment in the AE sale price by Rs.86,67,784/- in place of Rs.1,21,05,979/-. The Ld.CIT(A) confirmed upward revision and the assessee filed appeal challenging the CIT(A) Order.

4.0 For the AY 2009-10, the TPO has made upward adjustment of Arm's Length Price by Rs.10,53,047/- on identical facts which was confirmed by the Ld.CIT(A) and the assessee has filed the appeal challenging the order of the Ld.CIT(A) before this Tribunal. Since the issues involved in both the assessment years are common and the same, the appeals are disposed off in common Order and facts of the case are extracted from the Orders of the AY 2007-08.

5.0 The assessee company sold 4562.81 MTs of LAB to its AE for a sum of Rs.23,45,89,364/- and adopted the CUP Method at 1135 US \$ as per Form No.3CEB. The assessee sold product to its AE at US\$ 1105.25, 1150.50 and 1139.68 per Mt in three invoices on 17/07/2006, 13.12.2006 & 03.03.2007 respectively and held that it was comparable price at Arm's Length. The AO, found that the rate of 1135 US\$ per MT adopted by the assessee was taken from "**Infodrive.com**" which was prevailing rate in LAB market and not pertaining to any actual transaction. The TPO has rejected the external comparables since the assessee is having both AE

and non-AE transactions during said period and the ALP adopted by the assessee from public domain "**Infodrive.com**" is not actual transaction. The assessee requested for adjustment w.r.t. DEPB benefit @6%, EPCG benefit @3% and Foreign Exchange Benefit @3% for determining the ALP of sales made to the AE but the TPO rejected the said claim of the assessee also. The assessee went on appeal before the Ld.CIT(A) but did not succeed hence, the appeal filed before this Tribunal.

6.0 Appearing for the assessee Shri Vijayaraghavan, Ld.Sr.Counsel argued that the assessee has rightly adopted the external comparable data which is available on public domain and the TPO rejected the external data simply because it was branded as Relab and argued that there was no difference between the product exported by the assessee and the product Relab. Both the products are the same and subject to the same Central Excise Tariff on same code. The assessee is not a direct exporter of the non-AE transactions and that internal CUP in respect of deemed exports cannot be adopted for ALP unless due credit is given for adjustments such as DEPB, cash incentive and export incentives. The assessee further submitted that the TPO has compared, adopted the internal comparables of the different dates and the TPO should have taken the annual average since there was no internal sales on the same dates. Further, the Ld.AR argued that in case of adopting the internal comparables in AE transactions, the AO should allow adjustment for DEPB benefit, EPCG benefit and Foreign Exchange benefit which is around

@12% of the sale price. If the adjustment is made towards DEPB, EPCG, Foreign Exchange benefits, the rate arrived by the assessee is comparable and no adjustment is required.

6.1 On the other hand, the Ld.DR vehemently opposed the arguments of the Ld. AR of the assessee. The Ld.DR argued that assessee wants to take annual average which is not a correct approach, when the details of internal sales are available to the nearest date. The assessee has not made out a case that the rate adopted by the TPO is incorrect with comparable prices on the relevant dates. The AO adopted actual transactions which are close to the date of transaction. Therefore, the Ld.DR argued that, the TPO has rightly made the adjustment towards ALP on the basis of internal non-AE transactions. The D.R further argued that no adjustments need to be allowed for DEPB, export incentives on Internal cup since no such provision is provided for in determining the ALP and the assessee has not claimed any such adjustment in the TP study.

7.0 We heard the rival parties and perused the material placed on record.

The assessee has entered into international transaction with its wholly owned subsidiary M/s.Certus Investment & Trading Limited (CITL) for sale of 4562.81 MTs of LAB. The assessee company had the transactions in respect of products related to both AE & non-AE during above period. The assessee has not furnished the external data of

comparables for computing the ALP on the basis of actual transactions. The assessee adopted comparable price of US\$1135 MT in Form No.3CEB as available in "**Infodrive.com**" which was the prevailing price in the LAB Market during said period and held that the price of sale was comparable as per the CUP Method. The company had made transactions of unbranded LAB whereas comparables adopted by the assessee was branded product of Re-LAB produced by the Reliance. Since the assessee is having both AE and Non-AE transactions during said period and no external data was furnished by the assessee on actual transactions, it is more reliable and authentic to compare the internal price rather than external comparables on estimated prices. The TPO found that there were non-AE transactions in the months of July and December for comparing the sale price to the proximate date and for exports made on 03/03/2007, average sale price of February month is adopted which is nearest date of sale. Accordingly, the AO adopted monthly average for non-AE transactions. The comparison should be similar as per Rule 10B and branded products cannot be compared with the unbranded products. Though, the central excise duty paid on the same code, brand makes difference and the rates of branded products and non-branded products are quite different on the rates. The assessee is selling at higher rate in domestic market and at lesser rate to AE. The assessee has taken the external comparables from Infrodrive.com which does not distinguish the RPT transactions and non-RPT transactions. When non-AE transactions are available with the assessee own company, there is no reason to take

the external comparable data which is on estimated basis and at the prevailing market rates. OECD guidelines also support the internal cup method. Therefore we do not find any infirmity in adopting non-AE internal transactions as comparables and uphold the order of the Ld.CIT(A) and dismiss the assessee's grounds of appeal on this issue.

8.0 The next issue is for adjustment in respect of DEPB, EPCG and Foreign Exchange, the TPO rejected the assessee's request stating that -

"the assessee company itself while calculating the annual average price of the non-AE transaction has considered both the non-AE export transaction and the deemed export transaction. The assessee company has not made any distinction between its non-AE and deemed export transaction and has also not provided for any adjustment for the deemed export transaction. As per the ALP based on the annual average is less than its AE price. But the transaction claims for the adjustment on the deemed export transaction, when the comparison is made on the month basis. The assessee cannot take two different stands for its own convenience".

8.1 The export benefits are extended to the actual exports made by the export houses represent the subsidies and grants on exports to offset the loss if any on exports and the sale price is fixed inclusive of export incentives. Though, the AO sated that the assessee has not made any adjustment towards DEPB, EPCG and Foreign Exchange, the assessee has not made the adjustments since the price was at ALP. The A.O has adopted monthly average/transaction to transaction for ALP and it resulted in difference in ALP. Therefore, it is necessary to make adjustments in respect of export incentives on the basis of actually received/accrued to the assessee with respect to exports. Therefore, we **set aside** the Order of the CIT(A) on this issue and remit the matter back to AO to re-examine the issue and to make necessary adjustments to the

extent of incentive received or accrued on exports to AE and decide the ALP afresh. This issue is remitted back to AO for both the years and allowed for statistical purposes.

9.0 For the AY 2007-08 the assessee raised a ground for addition of Rs.7,19,000/- payment made to Shri Wilson towards interest without deduction of tax at source u/s.195 of Income Tax Act. The Ld.CIT(A) confirmed the addition holding that interest payment falls within the purview of Sec.195 of Income Tax Act and failure to deduct the tax at source attracts addition u/s.40(a)(i). During the appeal before us, the Ld.AR could not substantiate with any evidence that the payment made to Shri Wilson was not liable for deduction of tax at source u/s.195. Therefore, we hold that the Ld.CIT(A) rightly confirmed the addition and dismiss the assessee's ground of appeal.

10.0 For the AY 2007-08 in ground No.3, the assessee has raised ground for allowing correct amount of credit for TDS.

It is the duty of the AO to verify the pre-paid taxes and allow the correct amount of credit. AO should not make the assessee to suffer and run behind the offices and appellate authorities for getting credit for pre-paid taxes. Therefore, we direct the AO to give credit for the correct amount of TDS immediately.

11.0 In the result, the appeal for the AY 2007-08 is **partly allowed** and the appeal for the AY 2009-10 is **allowed for statistical purposes**.

Order pronounced in the open court on 29th December, 2016, at Chennai.

Sd/-

(एन.आर.एस. गणेशन)

(N.R.S. GANESAN)

न्यायिक सदस्य/**JUDICIAL MEMBER**

Sd/-

(डि.एस. सुन्दर सिंह)

(D.S.SUNDER SINGH)

लेखा सदस्य/**ACCOUNTANT MEMBER**

चेन्नई/Chennai

दिनांक/Dated: 29th December, 2016

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आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF