

आयकर अपीलिय अधिकरण, मुंबई न्यायपीठ 'के', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "K", MUMBAI

Before Shri Saktijit Dey, Judicial Member & Shri N K Billaiya, AM

आयकर अपील सं./ ITA No.1653/Mum/2014
निर्धारण वर्ष / Assessment Year 2009-10

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|--|-----|------------------------------|
| Advance Power Display Systems Ltd. Unit No.8 SDF, Seepz, Andheri (E), Mumbai 400 096 PAN AAACA5970G | Vs. | The DCIT Cir 8(1), Mumbai |
| (अपीलार्थी /Appellant) | | (प्रत्यर्थी/Respondent) |

Appellants By : Shri Y P Trivedi & Ms. Usha Dalal
Respondent By : Shri N K Chand

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| सुनवाई की तारीख / Date of Hearing :16.11.2015. | घोषणा की तारीख / Date of Pronouncement : 20.11.2015 |
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आदेश / ORDER

Per N K Billaiya, Accountant Member:

This appeal by the assessee is directed against the assessment order dated 20.01.2014 made u/s. 143(3) r.w.s. 144C(13) of the Act. The assessee is aggrieved by the transfer pricing adjustment of Rs.13,46,11,058/-.

2. The assessee is an export oriented unit engaged in the business of electronic manufacturing specializing in assembly and test of Switch Mode Power Supplies.
3. During the year under consideration the assessee has entered into following international transactions with its AEs:

| S.No. | Description of the transactions | Associated Enterprise | Amount (Rs. In crores) A.Y. 2009-10 |
|--------------|--|------------------------------|--|
| 1 | Import of raw materials | QCS QCSys | 106.87 6.84 |
| 2 | Export of finished goods | QCSys | 172.02 |
| 3 | Purchase of fixed assets | QCS QC Sys | 1.07 0.2058 |

A reference was made to the TPO for the determination of arm's length price in respect of international transactions entered into by the assessee as per the provisions of law.

4. During the course of transfer pricing proceedings, the TPO noticed that the assessee has not produced any fresh transfer pricing Study Report but has relied upon the transfer pricing study for F.Y 2007-08 relevant to A.Y. 2008-09 on the ground that the assessee as well as the transactions as regards FAR analysis essentially remained the same. The TPO proceeded by this admission of the assessee.

5. The assessee was asked to submit the working of adjustment for the year under consideration on the same lines as was done in AY 2008-09. The assessee gave the working of the same comparable with updated margins for the current year. The same comparables were adopted by the TPO in A Y 2008-09.

6. The assessee has shown cost plus margin at 6.26%. The working of the same read as under:

| Particulars | Amount (Rs.) |
|--|---------------------|
| Operating Income | 1,720,276,369 |
| <u>Operating Cost</u> | |
| Manufacturing expenses | 1,367,538,644 |
| Employee Cost | 158,616,665 |
| General & Administrative expenses | 49,326,000 |
| Depreciation | 44,010,583 |
| Change of stock | 13,000,532 |
| Foreign Exchange Fluctuation | 10,523,084 |
| Operating Costs | 1,643,015,508 |
| Less: Adj. for accelerate depreciation | 9,004,050 |
| Adj. for Fixed cost | 16,669,851 |

| | |
|-------------------------|---------------|
| Tour Adjustment | 25,673,901 |
| | |
| Adjusted operating cost | 1,617,341,607 |
| | |
| Operating profit | 102,934,762 |
| | |
| Cost plus margin | 6.26% |

The assessee was asked to justify the reasons for which adjustment of fixed cost and accelerated depreciation should be allowed. The assessee filed detailed reply vide letter dated 17.12.2012. The assessee's reply was two-fold; firstly, on account of accelerated depreciation and secondly, on account of lower capacity utilization of the assets. In so far as the claim of lower capacity of utilization is concerned, the TPO followed the stand taken by the TPO in the earlier A.Y. i.e. 2008-09 and has drawn support from the findings given for A.Y. 2008-09. The TPO dismissed the claim of the assessee.

7. In so far as the claim of adjustment for accelerated depreciation is concerned, the TPO was of the firm belief that the adjustments, if any, have to be made only to the margins of the comparable companies and not to the tested parties as has been claimed by the assessee. The TPO rejected the claim on this point also. The TPO proceeded by computing the margins of the tested parties after rejecting the claim of the assessee and the same reads as under:

| Particulars | Amount (Rs.) |
|-----------------------------------|----------------------|
| Operating Income | 1,720,276,369 |
| Operating Cost | |
| Manufacturing expenses | 1,367,538,644 |
| Employee Cost | 158,616,665 |
| General & Administrative expenses | 49,326,000 |
| Depreciation | 44,010,583 |
| Change of stock | 13,000,532 |
| Foreign Exchange Fluctuation | 10,523,084 |
| Operating Costs | 1,643,015,508 |
| | |
| Operating profit | 7,72,60,861 |
| | |
| Cost plus margin | 4.70% |

8. In so far as the comparables are concerned, the assessee has selected following comparables as has been done in the earlier assessment year.

| Sr. No. | Name of the company | OP/OC |
|----------------|----------------------------|--------------|
| 1 | Alpha Transformers | 22.53 |
| 2 | BBC Fuba India | -13.68 |
| 3 | Circuit Systems II | 6.26 |
| 4 | ECE Industries (seg) | 8.22 |
| 5 | Incap | 5.28 |
| 6 | Toyama Electric | 5.91 |
| 7 | Voltamp Transformers | 22.53 |
| 8 | Hyderabad Flextech | -26.92 |

The TPO did not accept Hyderabad Flextech as a comparable company since it was a perpetual loss making company.

9. After excluding Hyderabad Flextech as a perpetually loss making comparable and after considering the segmental profits of ECE on the basis taken during the preceding A.Y. 2008-09, the profit is worked out @1.94% and the TPO concluded by making the adjustment worked out as under:-

| Particulars | Amount (Rs.) |
|---|----------------------|
| Operating Income (A) | 1,720,276,369 |
| Operating Cost | |
| Manufacturing expenses | 1,367,538,644 |
| Employee cost | 158,616,665 |
| General & Administrative expenses | 49,326,000 |
| Depreciation | 44,010,583 |
| Change of stock | 13,000,532 |
| Foreign Exchange Fluctuation | 10,523,084 |
| Operating Costs (B) | 1,643,015,508 |
| | |
| Operating profit (C) | 7,72,60,861 |
| | |
| OP/OC (actual) | 4.70% |
| Arm's length OP/OC | 9.14% |
| Arm's length operating profit (D) = B x 9.14% | 15,01,71,617 |
| Arm's length operating income (E) = D + B | 179,31,87,125 |
| Adjustment = E - A | 7,29,10,756 |

The TPO made an adjustment of Rs.7,29,10,756/-

10. The matter was carried before the DRP. The assessee strongly objected to the adjustments made by the TPO. The objections raised before the DRP were on the same lines as were taken before the TPO.

11. The contentions/objections of the assessee did not find favour with the DRP, who was of the opinion that the DRP has already taken a view in the earlier assessment year against the assessee. However, on going through the comparables, the DRP found that the TPO has considered BCC Fuba India Ltd., as a comparable. The DRP observed that in AY 2003-04, this company was rejected as a comparable by the Tribunal on account of the fact that it was showing persistent losses. Accordingly, in exercise of powers vested upon the DRP u/s. 144C(8) read with explanation, the DRP excluded this company from the final list of comparables and issued necessary directions for the completion of the assessment. Following the directions of the DRP an upward adjustment of Rs.13,46,11,058/- was made by the AO. Aggrieved by which the assessee is before us.

12. Before us the learned senior counsel presented his submissions, which were three fold. Firstly, he strongly argued upon the point raised during the proceedings before the lower authorities relating to installed capacity qua utilization capacity. It is the say of the learned senior counsel that the installed capacity was 17 lacs whereas the utilized capacity was much less because of which the fixed cost have become very heavy. The learned counsel further pointed out that in support of this contention the assessee had produced certificate from the Chartered Accountant, which did not find any favour with the revenue authorities. The counsel further stated that an identical issue was there before the Tribunal in A.Y. 2008-09 and the Tribunal has restored the matter back to the file of the TPO with a direction to examine the veracity of the assessee's contention about the installed capacity and the actual utilization.

13. Secondly, the learned senior counsel argued on the claim of accelerated depreciation. It is the say of the learned counsel that the assessee wanted to re-adjust the higher depreciation. This claim was also negated by the TPO and the DRP. The counsel brought to the notice of the Bench the decision of the Tribunal in

A.Y. 2008-09, wherein the Bench has followed the findings of the co-ordinate Bench in the case of Petro Araldite (P.) Ltd., 35 taxmann.com 590 in ITA No. 3782/Mum/2011.

14. Thirdly, the counsel submitted his case on the selection of the final comparables. It is the say of the counsel that one comparable was ignored by the TPO while the DRP removed one more without referring the matter back to the TPO. The counsel strongly relied upon the decision of the Hon'ble jurisdictional High Court in the assessee's own case for A.Y. 2003-04.

15. Per contra, the DR strongly supported the findings of the revenue authorities. The DR objected to the claim of exclusion of two comparables. It is the say of the DR that both the companies fail to pass the test of filter adopted by the assessee itself. He further pointed out that both these companies viz., Hyderabad Flextech Ltd. and BCC Fuba India Ltd are perpetual loss making companies and by assessee's own filters these companies do not pass the test. Therefore, there is no reason why these two companies should not be excluded.

16. We have heard the rival submissions at length. We have given a thoughtful consideration to the order of the authorities below and with the assistance of the learned senior counsel we have considered the relevant documentary evidence brought on record before us. In so far as the issue of capacity utilization qua actual utilization is concerned, the same was considered by the Tribunal in the assessee's own case in ITA No. 6490/Mum/2012 for A.Y. 2008-09. The issue finds place at para 14, wherein the co-ordinate Bench has followed the principle laid down by the Tribunal in the case of M/s. Petro Araldite (P.) Ltd. (supra). After discussing the decision of the Tribunal in the case of Petro Araldite (P.) Ltd at length the Tribunal finally came to the conclusion "*in view of the above, the entire matter of transfer pricing adjustment is restored to the file of the AO to deal and decide this issue afresh and in accordance with the provisions of law and also after considering the ratio of the aforesaid decisions of the Tribunal*". Respectfully following the decision of the co-ordinate Bench and following the rule of consistency, we restore the issues

relating to the transfer pricing adjustment to the file of the AO. The AO is directed to decide the same in line with the directions given for A.Y. 2008-09.

17. In so far as the claim of accelerated depreciation is concerned, this issue is taken care of by the decision of the Tribunal for A.Y. 2008-09, which we have relied upon and direct the AO to decide the issue for the year under consideration also following the order for A.Y. 2008-09.

18. In so far as the third contention relating to the exclusion of two comparables viz. Hyderabad Flextech Ltd. and BCC Fuba India Ltd. is concerned, undisputedly, these two companies are loss making companies as demonstrated by the learned DR successfully. However, the TPO excluded Hyderabad Flextech Ltd. and considered BCC Fuba India Ltd. on the same ground that the company is loss making; this is self contradictory and, therefore, in the interest of justice and fair play, we restore this issue also to the files of the AO. The AO is directed to decide the issue afresh after verifying whether these two companies are perpetual loss making companies or have shown loss for the year under consideration only. The assessee is directed to furnish all necessary details, which will include the under utilization of capacity by the comparable, perpetual loss or otherwise made by the two companies viz. Hyderabad Flextech Ltd. and BCC Fuba India Ltd. The AO is directed to consider the details and decide the entire issue of transfer pricing adjustment after giving a reasonable and fair opportunity of being heard to the assessee.

19. In the result, the appeal filed by the assessee is treated as allowed for statistical purpose.

Order pronounced in the open court on this 20th day of November, 2015.

**Sd/-
(Saktijit Dey)**

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 20th November, 2015.

SA

**Sd/-
(N K Billaiya)**

लेखा सदस्य/ ACCOUNTANT MEMBER

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

1. अपीलार्थी /The Appellants.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A), Mumbai.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, 'K' Bench, ITAT, Mumbai

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

प/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai