

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-1' NEW DELHI**

**BEFORE SMT DIVA SINGH, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.-1582/Del/2015
(Assessment Year: 2009-10)

ACIT, Circle-3(2), Room No. 380B, C.R. Building, I.P. Estate New Delhi.	vs	Asahi India Glass Ltd. 38, Okhla Industrial Area, Phase-III New Delhi 110 020 PAN AADCA7706R
Assessee by	None	
Revenue by	Sh. Kumar Pranav, Sr. DR	

Date of Hearing	05.06.2018
Date of Pronouncement	03.08.2018

ORDER

PER DIVA SINGH, J.M.

The revenue has filed the present appeal assailing the correctness of the order dated 19/12/2014 of CIT(A)-44 New Delhi pertaining to 2009-10 assessment year on the following ground :

“Whether the Ld. CIT(A) has erred in deleting the addition made by the TPO relying on the ITAT judgment in the case of Sona Okigawa Precision Forgings Ltd. vs Addl. CIT [2012] 17 Taxmann.com 141 (Delhi) and inter-alia holding that the taxpayer was not contract manufacturer of its AE.”

2. At the time of hearing, no one was present on behalf the assessee, however, considering the ground raised by the revenue and the material available on record, it was deemed appropriate to proceed with the present appeal ex parte qua the assessee-respondent on merits after hearing the Ld. Sr.DR, Mr. Kumar Pranav.

3. The Ld. Sr.DR inviting attention to the TPO's order dated 21/01/2013 submitted that in the facts of the present case, the assessee was heard at length by the TPO and after considering the submissions, the TPO on going through the transfer pricing documentation carried out a FAR analysis and concluded that the assessee is paying royalty to its AE and after considering its business model noted that since the exports were also made to the associated companies thus in effect the assessee was paying royalty for exports made to its AEs. Considering the fact that the assessee was working as a contract manufacturer for the limited purposes of exports made to its AE's where the technology was taken from the AE's the raw material was purchased from the AEs

the goods were also sold to its AE's and on such goods sold to its AE's royalty is also paid to the AEs. In the circumstances, the AO concluded that the transaction was not at arm's length. As a result of this the payment of royalty for exports to AEs was held to be 'nil' and the income of the assessee was directed to be enhanced to that extent. Heavy reliance was placed thereon. The relief granted by the CIT (A) in deleting the addition is assailed. It is seen that the draft assessment order dated 31/03/2013 was challenged in appeal before the CIT (A) by the assessee. Reliance was placed upon the decision of the ITAT in the case of Sona Okegawa Precision Forgings Ltd. Vs Additional CIT (2012) 17 Taxmann.com 141 (Delhi). Considering the facts and the law, the addition was deleted by the CIT (A). The said action is challenged by the Revenue in the present appeal.

4. We have heard the submissions and perused the material available on record.

4.1 On a reading of the TPO's order, it emerges that the assessee company was established in the year 1987 for manufacturing of high quality automotive glass for the Indian automobile industry. Subsequently, the assessee also forayed into manufacturing of architectural and float glass.

4.2 During the relevant assessment year, the assessee had three lines of business – (i) Auto Glass; (ii) Float Glass; and (iii) Architectural Glass. It has been stated that owing to the low sales volume in the architectural glass segment, this segment was aggregated with the Auto Glass Division. Accordingly, the assessee had organized its business into two Strategic Business Units ('SBUs') of Auto Glass and Float Glass. It is noticed from the TPO's order that in the year under consideration the following international transactions were reported by the assessee :

Description of the transactions	Amount (Rs. crores)
Auto Glass Division:	
Purchase of Raw Material	58.63
Import of stores & new	10.42
Sale of finished goods	32.23
Purchase of Capital Goods	16.04
Fee for Technical consultancy	0.12
Royalty for use of technical know-	6.31
Float Glass Division:	
Import of stores & machinery	0.5
Import of clear float and	3.35
Sale of finished goods	32.56
Royalty for use of technical know-	17.43
Commission on Sales	1.31

4.3 The assessee in order to benchmark the international transactions used CUP method which was further supplemented by using TNMM method on an aggregate basis with OP/sales as the profit level indicator. The margin of the assessee company at the entity level using OP/sales was computed in its TP study at 4.47%. The assessee selected 8 comparables. The mean margin of the comparables using current year's data, it was shown as worked out at 2.02%. On the basis of the same, it was claimed that the transaction was at an arm's length.

4.4 TPO, however, did not accept the assessee's claim. Exercising the power vested in him vide Section 92B, he held that he was required to apply the appropriate method for each transaction and reliance was also placed upon the OECD guidelines, he held that the issue had to be decided on a transaction by transaction approach. He further took note of the fact that the said approval also had judicial sanction. Accordingly, he held that the payments for management services would have to be benchmarked separately. Reliance was placed on the decisions in *the cases of* (i) M/s Abhishek Auto Industries Ltd (2010-TII-54-iTAT-Del-TP) wherein it had been held that only International transactions are to be taken into account and not the enterprise level; (ii) M/s Ankit Diamonds (2010-TII-67-ITAT-Mum-TPJ) wherein it had been held that under TNMM, ALP has to be determined on the profit realized from an International transaction and not at entity level; (iii) M/s Birla Soft (India) Ltd (2011-TII-41-ITAT-Del-TP) the ITAT wherein it had been held that segmental account, even if unaudited, can be considered if the income or the expenses have been properly allocated; (iv) M/s Chiron Behring Vaccines Pvt Ltd (2011-TII-30-ITAT-Mum-TP) wherein it had been held that TNMM requires comparison of net margin realized from international transaction and not comparison of operating margin of the enterprise as a whole. According to the ITAT, transaction by transaction approach has to be adopted; (v) M/s Exxon Mobil Company India Pvt Ltd (2011-TII-68-ITAT-MUM:TP) wherein it had been held that two different activities like research activity and activity of promoting the licensing of technology owned by the group marketing activity) cannot be clubbed together; (vi) M/s Global Vantage Pvt Ltd [2010-TIOL-24-ITAT-Del] wherein it had been held that Comparability is to be done at segmental level and not at entity level; (vii) Following decision in the case of Twinkle Diamond etc the ITAT, Mumbai in the case of M/s Golawla Diamonds (2010-TII-53-ITAT-Mum-TP) wherein it had been held that net margin realized from the transaction or class of transactions

is to be compared and not entity level margin; (viii) M/s Marubeni India Pvt Ltd (2011-TII-36-ITAT-Del-TP) wherein it had been held that the profit of a particular operation cannot be clubbed with the earning of any other revenue stream; (ix) M/s Ranbaxy India [299 ITR (AT)175(Del)] wherein it had been held that ideally ALP should be determined transaction by transaction; (x) M/s SAP Labs India Pvt Ltd (2010-TII-44-ITAT-Bang-TP) wherein it had been held that comparable with no segmental breakup/information is not to be considered; (xi) M/s Star Diamond Group (2011-TII-20-ITAT-Mum-TP) wherein it had been held that ALP of the International transaction is only to be determined. Entity level profit margin cannot be taken; (xii) M/s Star India Pvt Ltd [2008-TIOL-426-ITAT-(Mum)] wherein it had been held that each international transaction is to be examined separately and ALP should be determined accordingly and different activities cannot be clubbed and common ALP cannot be determined; (xiii) M/s Starlite Pvt Ltd. [2010-TII-28-ITAT-Mum-TP] wherein it had been held that TNMM does not permit comparison at enterprise level profits, it requires comparison of net margin realized from an international transaction; (xiv) Symantec Software Solutions Pvt Ltd (2011-TII-60-ITAT-MUM- TP) wherein it had been held that TNMM requires comparison of net margin realized from the international transaction and not enterprise level margin; (xv) M/s Technimount ICB Pvt Ltd (2011-TII-31-ITAT-Mum-TP) wherein it had been held that segmental results are to be considered and not the profit at entity level; (xvi) M/s Twinkle Diamond (2010-TII-09-ITAT-Mum-TP) and M/s Tez Diam (2009-TII-02-ITAT-Mum-TP) wherein it had been held that TNMM does not permit comparison enterprise level profits and that it requires comparison of net profit margin realized from an international transaction or aggregate of class of international transactions; (xvii) M/s UCB India Pvt Ltd [317 ITR (AT) 292 (Mum)] wherein it had been held that Rule 10B(l)(e) refers to net profit realised from international transactions and not of enterprise as a whole. The assessee cannot justify its inability to evaluate its transaction on standalone basis on the ground that there is no statutory requirement to maintain segmental data. Entity level comparison not permissible when only 50% transactions were international transactions; ALP to be determined on segmental results only; (xviii) M/s UE Trade Corporation (India) (2011-TII-04-ITAT-Del-TP) wherein it had been held that the AO had made the adjustment by applying CUP method on transaction by transaction basis and the ITAT upheld the AO's approach of benchmarking on transaction

by transaction basis; (xix) M/s Vedaris Technology wherein it had been held that company with no segmental information and having major revenue from other activity cannot be taken as a comparable; and (xx) M/s Wockhardt Ltd (2010-TII-46-ITAT-Mum-TP) wherein it had been held that TNMM requires comparison of net margin realized from International transaction or on aggregate of international transactions and not comparison of margins of enterprise as a whole.

4.5 Considering the provisions and the judicial precedent, the TPO concluded that the issue on facts has to be separately benchmarked as even Section 92B of the Act recognizes the analysis of different class of transactions separately including these types of payments, which have a bearing on the profits.

4.6 As a result thereof, transaction relating to payment of royalty, he held was to be benchmarked separately.

4.7 The assessee's TP study of aggregating the transactions and applying CUP was held to be contrary to the judicial precedent available. Since the said conclusion is not under challenge in the present proceedings without referring to the decisions which have been relied upon and noticed by the TPO, we take note of the fact that the TPO concluded that since the transaction has a bearing on profits and thus royalty was to be benchmarked separately. He, therefore, proceeded to carry out an analysis of the functions performed; assets and risks undertaken i.e. FAR of the assessee. Since the observations made on the basis of the FAR analysis carried out have a bearing on the issue at hand, it would be appropriate to refer to the same from the TPO's order:

“3.2 FAR Analysis

Functions performed by AIS

AIS is the largest manufacturer of automotive safety glass in India, supplying high quality auto glass to almost the entire passenger vehicles industry in India. Auto glass is also supplied to the automotive after-market. Further, the Division also exports auto glass to the after-markets of Europe, South East Asia and other neighboring countries.

The Auto Glass Division manufactures a variety of auto glass like toughened glass, laminated windshield, tempered glass, defogger glass, reflective windshield, Defogger glass etc. It has three manufacturing plants located in Bawal in Haryana, Chennai and a recently commissioned plant in Roorkee. Additionally, it also has sub-assembly units/ warehouses at Halol in Gujarat, Pune, Talaja and Bangalore. Each of these catering to the OEMs situated in that location/region.

The Auto Glass Division functions as an independent SBU responsible for managing its own market and profitability. Hence, its functions performed, transactions

undertaken, assets employed and risks borne reflect the market-driven, entrepreneurial behavior of a normal business catering to its customers.

Procurement

The entire procurement function for the raw material and spares required by the Auto Glass Division is handled centrally by the procurement team. The raw material and spares required in the Auto Glass Division are float glass, PVB and other spares and consumables.

The marketing department provides the sales plan based on its interactions with and the demand forecast of the OEM customers. This sales plan is input for the production team that decides on the production plan accordingly. Based on the estimated production, the material requirement and hence the procurement plans are made and the orders are placed with the vendors.

The float glass supply for the Auto Glass Division is procured from AEs, third party suppliers as well as from the Float Glass Division of the Company. However, procurement of float glass from Float Glass Division is subject to various constraints like available capacity, capability (quality and thickness, etc.) of the plant as well as consideration for the opportunity cost of catering to its external customers vis-a-vis captive consumption by the Auto division.

Among its AEs, AIS procures float glass from AGC Flat Glass Asia Pacific Pte. Ltd., Singapore (AGC, Singapore).

With respect to the purchase of stores, consumables and child parts, such purchases are made from both AEs as wells as non-AEs. During the year, the machines were imported in Chennai to support production of new laminated windshield for which the machinery was imported from the Group Companies. Quality Control

AIS bears all the risk with respect to its auto glass and hence stringent quality standards and checks are in place at each step of glass manufacturing, right from the time of procurement to during the processing and the final product stage.

In case of any quality issue with the procured material, either at the time of receipt or at the time of being used in the production line, claims are raised on the vendor. Similarly, in case of any rejections at the OEM customer end, AIS bears the cost.

Marketing

The marketing department liaisons with the OEM customers and determines the expected demand. This input is strategic as it determines the production schedules.

The department is engaged in providing customer support to the OEMs, acquiring new customers, managing relationship with existing customers and pricing of products. Exports, being generally to the Group Companies, do not require significant marketing effort.

Pricing

AIS in its Auto Glass Division acts in the capacity of an independent entrepreneurial company engaged in supplying automotive glass to various OEMs, exports and also catering to the aftermarket. It undertakes all functions associated with management of production of glass (like procurement, supply chain management, quality control, marketing etc.). Functions performed by AIS - Float Glass Division

Procurement

AIS does not have access to any captive source of raw material and is entirely dependent on third party suppliers for supply of raw material as well as consumables and spares

Quality Control

AIS has put in place quality control measures to ensure that the float glass produced is free from any defects. Common quality defects in float glass include bubble formation and ripples. AIS uses various automated inspection modes to take corrective actions and also to steer its cutters around the flaws to minimize wastage.

Marketing and Distribution

The Float Glass Division produces float glass catering to the construction, interior decoration as well the automotive industries. AIS sells its products through dealers and stockists across India.

Pricing

The pricing of float glass is entirely driven by the market forces of demand and supply. It is more like a commodity product with low margins.

Commission

AIS also trades in certain types of float glass imported from its Group Companies. For these sales the Company utilizes its existing dealer network. In certain cases where the AEs have made any direct sale in the Indian market, AIS receives a commission income.

Thus, AIS in its Float Glass Division acts in the capacity of an independent entrepreneurial company engaged manufacture of float glass to the market through its dealer network. It undertakes all functions associated with management of production of float glass.

Assets employed

Tangibles owned by AIS

AIS utilizes its manufacturing facilities, office premises, warehousing facilities, communication facilities, etc. for the purpose of its business.

Intangibles

The AEs owns significant intangibles like technology, know-how, technical information, research findings, proprietary knowledge and other intangibles like techniques, testing/quality control standards, etc. which are a result of the R&D activities undertaken by the Group.

On the other hand, AIS does not own any non-routine intangibles and does not undertake any significant research and development on its account that leads to the development of non-routine intangibles. AIS uses the processes, technical know-how, technical data, operating/quality standards etc. developed / owned by Asahi Group. All group entities leverage from these intangibles for continued growth in revenues and profits.”

4.8 The record shows that the TPO issued a show cause notice dated 19.11.2012. Excerpts from the said notice are found extracted in para-5 of his order relating to the issue are reproduced hereunder for ready reference :

“5. A detailed show cause dated 19.11.2012 was therefore issued. Its part excerpts are as under:

Please refer to the ongoing transfer pricing proceedings in your case.

A. Royalty Payment:

- 1. Please furnish Copies of-agreements based on which the royalty / technical fee / trademark fee has been paid.*
- 2. Please provide the nature and complete description of the "intangibles" transferred or licensed to the assessee company in respect of which royalty / technical fee/ trademark fee is paid. Please furnish the details of process, product/component or device, covered by the intangible property.*
- 3. When was the technology developed ?*
- 4. Whether there are technological improvements over a period of time? Whether the assessee has right to receive upgraded versions or modifications to the technology ?*
- 5. Please state the uniqueness of such intangibles and the life of such intangibles.*
- 6. What is the life of the patent as per the law in the country of the licensor ?*
- 7. Whether such intangibles or substitutes thereof are available in the open market ?*
- 8. Please state as to how the rate or payment for Royalty/technical fee/ trademark fee has been determined at the time of entering in to the agreement? Please also furnish the basis thereof*
- 9. Please state as to whether any cost benefit analysis was done while entering into the agreement for payment of royalty/ technical fee/ trademark fee ?*
 - a. If so the details of such cost benefit analysis should be furnished. The cost benefit analysis should include the expected benefit from the use of technology vis a vis the payment made for the technology.*
 - b. Please specifically state as to whether any benchmarking analysis was done at the time of entering into the agreement so as to compare the payment of*

royalty/technical fee/ trademark fee to the AE vis a vis an independent party under similar circumstances. If so, the details thereof.

10. *Please show with evidence as to what tangible and direct benefit has been derived by you by use of such intangible.*
11. *Please state and quantify as to how the benefits derived by the use of technology commensurate with the payment made. Also please state the methodology use for quantification of the benefits.*
12. *What is the rate of royalty paid by other AEs to the company providing the intangible? If there is a difference in the rate of royalty, please state as to what is the difference in the technology transferred to the assessee company and the other AEs.*
13. *Whether the AE is providing similar technology to any independent party also? If yes what is the rate of royalty charged from such independent parties ?*
14. *Please show with evidence that royalty/technical fee/ trademark fee payments are not included in the price of goods purchased from the AE. If no such evidence is produced why should it not be presumed that the royalty/technical fee / trademark fee is embedded in the purchase price of goods and hence no separate payment for royalty/technical fee/ trademark fee should have been made.*
15. *Please state as to why royalty should be paid on sales to AEs, when they are part of the same group from where the technology is sourced ?*
16. *Is there any cost contribution agreement between the assessee company and the AE for development of the intangible property? If yes, please furnish a copy of such agreement and details in respect of the cost incurred in pursuance to such agreement and the benefits derived by the assessee company.*
17. *Compare profits before and after use of intangible for the last three years and next two years including the present financial year i.e. FY 2008-09.*
18. *What is the contemporaneous industry rate of royalty for similar technology paid by other independent company in India ?*
19. *If the royalty is for trading / marketing intangible like Brand name, logo, advertisement etc.*
 - a. *Please furnish the agreement between the AE and the tested party to substantiate the legal and economic ownership of the intangibles.*
 - b. *Please state whether the tested party is merely an agent or an independent distributor?*
 - c. *Have you spent any amount on advertisement or marketing? If yes, please give the details regarding the amounts spent on such advertisement and marketing by the tested party, the details of the benefit, if any, derived by the tested party by /through such campaigns. Give the details as to how much and in what manner, the AE has compensated the tested party for the expenditure incurred towards the advertisement or marketing campaign, undertaken by it.*

If the above information is not furnished along with contemporaneous documentary evidences and separate benchmarking for these transactions is not done, the payment for Royalty would be treated as Rs. Nil by applying CUP method.”

4.9 The assessee's reply on record has been also extracted. In the order, however, for the reasons set out hereunder, it was held to be not acceptable. Since relief has been granted by the CIT (A) on the basis of facts available on record before the TPO which remain unrebutted till date, it is appropriate to reproduce the assessee's submission before the TPO extracted in his order. The reply in pages 12 to 17 of the TPO's order are set out in para 5.1 and 5.2 and is reproduced hereunder for ready reference :

“5.1 The assessee in its reply dated 16.10.2012 inter-alia stated as under :

The assessee has paid royalty to Asahi Glass Co. Ltd., Japan ('Asahi Japan') towards use of patented technology under licensing arrangement for manufacturing of auto and float glass products. The royalty to Asahi Japan is based on fixed percentage on net sales.

Similarly, the assessee has also paid royalty to Glaverbel towards use of patented technology under licensing arrangement for manufacturing of float glass. The royalty to Glaverbel is based on fixed rate on units manufactured.

The assessee would like to refer to "License agreement on tempered glass by new roller form furnace (Phase 2.5)" entered with Asahi Japan wherein the assessee has received right to use the patented technology, technical data, know-how for the manufacture, use and sale of tempered sidelite glass within a designated territory to the assessee. The patent related information of such technology and know-how is provided in Exhibit 1-1 of the agreement.

Further, the assessee would like to refer to Clauses 1.3 and 1.4 read with Schedule A of its agreement with Asahi Glass Company Limited, Japan for the establishment of its float glass plant at Taloja (T-7 Agreement). The aforementioned clauses of the T-7 agreement comprehensively encapsulate the entire process and flow chart of the float glass production process which has been licensed to the assessee.

Similarly, the assessee would also invite your good self attention to clauses 3 and 4 of its agreement with Glaverbel Netherland BV for the establishment of its float glass plant at Roorkee (Roorkee Agreement). Under the Roorkee agreement, the assessee has been licensed the right to use technical data, know-how for the manufacture, use and sale of licensed glass within a designated territory.

Please refer Annexure B for patent related information about technology and know-how.

The assessee would like to highlight that the it commands almost 80% share of auto glass requirement of the passenger car industry in India. In addition, Auto Glass division of the assessee also exports its products in the after-markets of Europe, South East Asian and other neighbouring countries.

The global float glass industry is highly concentrated with about 4 players accounting for a sizable share of the market. Asahi Glass, NSG/Pilkington, Saint

Gobain and Guardian. Other market participants include PPG, Central Glass, Hankuk, Visteon, Cardinal Glass Industries¹. However, the technology and know-how of float glass is only restricted to Asahi Glass, Saint Gobain and Guardian. Pilkington globally owns the technical know-how for float glass. All other manufacturers may be utilizing either variants of licensed technology of these 4 companies or using processes for which the patents have expired.

Thus, your goodself will appreciate that all the players in the float glass industry would be licensing the technology and know-how of their respective group companies for the production and sale of float glass in its region. Hence, it is evident that such licensing and technology agreements amongst group companies are a part of the strategic alliances made by all float glass manufacturers across the world.

The assessee would wish to highlight that the Asahi brand and associated technology is quintessential for its continued existence and sustenance in the auto and float glass market. Since float glass constitute the base raw material for manufacture of auto-glass, the float glass technology would be crucial for the performance of its automotive division. Generally, the float division provides about 50% of the total raw material requirement of the automotive division. Thus, in the absence of the requisite know-how, the assessee would be compelled to rely on external suppliers which would result in a dip in its overall profits. Further, reliance on external suppliers may also disrupt the continuity and quality of production cycle.

During FY 2008-09, the assessee commanded a market share of 80% of the automotive glass market including after-market and 34% of the float glass industry².

Your goodself would also appreciate that the assessee's business was originally conceived as a strategic alliance between Asahi Japan and Maruti Suzuki to primarily cater to the automotive glass requirements of the latter based on float glass imports made from Asahi Japan. Subsequently, the assessee acquired Float Glass India in 2002, a joint venture between Tata and Asahi Glass, as a backward integration strategy to indigenously manufacture float glass for its automotive glass plant.

Presently, the assessee continues to be the designated supplier to Maruti Suzuki as well as to other OEMs like Hyundai, Honda, Toyota, Mitsubishi, VoxWagon, General Motors, Skoda and Tata Motors. In the absence of the aforesaid collaboration, the assessee would have lost a significant portion of its business to its competitors. In view of its close nexus to the assessee's business, a cost benefit analysis cannot be empirically demonstrated.

As stated earlier, the assessee has been receiving continuous technical know-how, information, inputs, training and support for the manufacturing of float and auto glass and its variants from its AEs.

Common quality defects in float glass include bubble formation and ripples. These defects curb the use of end use of float glass results in bulk rejection of orders and loss of customer base. The licensed technology ensures lower defects, increased aesthetics and enhanced product perception.

Further, float glass is often treated with colorants and chemical coatings for specialty applications. The licensed technology includes the licensing of these production proprietary processes which ultimately increase the product profile of the assessee.

Nearly, every automobile manufacturer in India considers AIS to be a 'vendor of choice' not only for its existing models but also for the new models that are developed or brought into India. During the year, your Company gained new customers and deepened its relationship with existing ones. AIS Auto Glass has also been appreciated by its customers for its quality and delivery. Maruti Suzuki India Ltd. awarded AIS for 'Outstanding Overall Performance' and Mahindra & Mahindra Ltd. and Tata Motors Ltd. have separately certified your Company's quality excellence. Toyota Kirloskar Motors Ltd. has selected your Company as one of the seven Original Equipment (OE) vendors to set up a sub - assembly unit in their proposed supplier park for their upcoming small car project.

Size, scale and presence across the entire value chain - from float glass to value-added glass and overall glass solutions -are some of the fundamentals of AIS that is unmatched by any other player in India. The skills and knowledge base that your Company has developed over the years, especially for engineered glass products, is second to none. And, most importantly, it continues to deliver on the trust and confidence reposed by its customers.

It maybe also noteworthy that significant portion of the sales revenue of the assessee represents sales made to global OEMs in India. These sales would not have been possible in absence of the technical and brand affiliation with the Asahi Group. Further, a mammoth portion of the benefit derived by the assessee includes retention of its customer base who may be lured by competitors unless the assessee constantly evolves its product portfolio.

The direct benefit which assessee derives from the technology and technical know-how arrangement with Asahi Group is the increase in the sales over the years with its ability to cater to the changing needs of its customer which can be seen from the table below:



The assessee humbly submits that the tangible and direct benefits from the use of technical know-how cannot always be measured in terms of growth in profitability. Since assessee acts an entrepreneur and bears all business risks, the profitability of the assessee is bound to be impacted by market factors and not because of intra group transactions as such payment of royalty.

Further, the assessee would like to make a passing reference to the Tribunal Ruling by the Mumbai Bench in case of Dresser- Rand India Pvt. Ltd. [ITA No. 3939/Mum/2010] wherein it was stated that:

" 8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to- external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an assessee and what is not. An assessee may have any number of qualified accountants and management experts on his rolls, and yet he may decide to engage services of outside experts for auditing and management consultancy; it is not for the revenue officers to question assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of assessee's decision to take benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities."

(Emphasis supplied)

4.10 It is seen that the assessee also gave the following break up of royalty on sales to the TPO which has been extracted in Para 5.2 in his order and it is also reproduced hereunder :-

Particulars	T1*T2	IAM-I&II	Lam	FL-1	OTHER PLANTS	TOTAL
SALES	510,007,987	1,646,669,605	833,248,633	3,240,669,007	6,130,787,006	12,361,382,237
EXPORT SALES TO ASSOCIATED ENTERPRISES	16,652,113	17,289,997	299,831,349	314,127,929		647,901,388
EXPORT SALES TO NON ASSOCIATED ENTERPRISES			18,442,980			18,442,980
	526,660,100	1,663,959,601	3,554,079,982	3,554,796,936	6,130,787,006	<u>13,027,726,604</u>
ROYALTY PAID ASSOCIATED ENTERPRISES	4,411,716	13,916,180	9,778,958	21,390,945	187,943,446	237,441,245
ROYALTY PAID NON ASSOCIATED ENTERPRISES	123,993				0	<u>123,993</u>
TO ROYALTY PAID (Royal X Export Sales to AE/ Net turnover)		<u>237,565,238</u>				
		144,046	146,120	3,518,803	2,073,490	5,882,458

4.11. Considering the submissions, the TPO summed up the facts in the following manner :-

“5.3 On analysis of the above facts, following points are noticed:

- 1. The assessee is paying royalty to Asahi Glass Company Ltd.*
- 2. The exports are made to associate companies like AGC Flat Glass KILN LLC, Russia Federation. AGC Flat Glass Vostok LLC, Russia, AGC Philippines, Asahi Glass Company Japan, Bind AGC Automotive Europe SA Belgium.*
- 3. The assessee, in a way is paying royalty to Asahi Glass Company Ltd. for the exports made to it and other AEs.”*

4.12 In view thereof, the explanation offered was not accepted by the TPO who was of the view that payment of royalty to the AE for the exports made to AEs is in the nature of price reduction for the products sold to AEs. The assessee company, he was of the view, was in fact worked as a contract manufacturer for the limited purpose of exports made to the AEs. The technology was taken from the AEs, the raw material was purchased from the AEs, the goods were sold to the AEs and on such sale of goods to AEs royalty is also paid to the AEs. The TPO, in this regard, it will be pertinent to mention that the position of the assessee company with regard to manufacturing for the AEs was taken to be akin to that of a Contract Manufacturer wherein the assessee was purchasing raw material from the AEs. Goods were manufactured in India and then a part of it is exported to AEs. The royalty paid as a percentage of sales to the associated enterprise was held them not to be at arm's length because it amounted to collecting royalty on the sales to itself. All the AEs are typically within the broad umbrella of the multinational corporation. He held that even though, it appears that the technical knowhow is commercially exploited in India, in reality the price for these activities are not fixed by market forces. Whether the sales of the assessee are made within India to its AE or to the parent company, he held did not make much difference to the principles of arm's length transactions. In this case the capacity and other parameters, it was held, were tied to the AE capacity and the assessee consequently, it was held, could not act like an entrepreneur. Therefore, both the risks and the reward, it was concluded, were like a contract manufacturer. No contract manufacturer, he held, would like to make this kind of transactions with an independent third party. All the AEs are typically within the broad umbrella of the multinational corporation. Even though, it

appears that the technical knowhow is commercially exploited in India, in reality the price for these activities are not fixed by market forces. Whether the sales of the assessee are made within India to its AE or to the parent company, he held, did not make much difference to the principles of arm's length transactions. In this case, the capacity and other parameters were thus also tied to the AE capacity and the assessee in the circumstances could not act like an entrepreneur. Therefore, both the risk and reward were like a contract manufacturer. No contract manufacturer would like to make this kind of transactions with an independent third party.

4.13 Relying upon the OECD guidelines in respect of exploitation of intangibles not only from the perspective of the transferor which would examine the pricing at which a comparable independent enterprise would be willing to transfer the property but also from the perspective of the transferee, he noticed that it has been considered necessary to examine the price from the perspective of the transferee and see if a comparable independent enterprise may or may not be prepared to pay such a price, depending on the value and usefulness of the intangible property to the transferee in its business. The payment of licence fee would depend on the benefit to independent company reasonably expects to get from the use of the intangibles having regard to other options realistically available. The decision taken since would necessitate in incurring cost by way of investments etc. which would be weighed keeping in mind the licence fee to be paid vis-à-vis the expected benefits from the additional investments etc. for an independent enterprise. Further, he also considered the possibility that the said intangibles may already stand included in the price of goods sold by the AE or purchased from the AE by the related party. These situation, it was noticed, had also been considered in the OECD guidelines.

"6.17 The compensation for the use of intangible property may be included in the price charged for the sale of goods when, for example, one enterprise sells unfinished products to another and, at the same time, makes available its experience for further processing of these products. Whether it could be assumed that the transfer price for the goods includes a license charge and, that, consequently, any additional payment for royalties would ordinarily have to be disallowed by the country of the buyer, would depend very much upon the circumstances of each deal and there would appear to be no general principle which can be applied except that there should be no double deduction for the provision of technology. The transfer price may be a package price, i.e., for the goods and for the intangible property, in which case, depending on the facts and circumstances, an additional payment for royalties may not need to be paid by the purchaser for being

supplied with technical expertise. This type of package pricing may need to be disaggregated to calculate a separate arm's length royalty in countries that impose royalty withholding taxes."

4.14 Thus, noting that in the facts of the present case the assessee is making a part of its sales to its related parties and the benefit of producing components is reaped by the AE the payment of charges for royalty, therefore, it was held, did not confirm to arm's length principle. As a result of this, ALP of the transaction related to payment of royalty for exports to AE of Rs.58,82,458/- was taken at Nil leading to the direction issued to the AO to enhance the income by the said amount.

5. Pursuant to this direction, the draft assessment order was passed and the assessee aggrieved by this order carried the issue in appeal before the CIT(A).

6. The CIT(A), it is seen, took into consideration the facts that the turnover of the assessee company was around 1300 crores out of which the export sales was only 65 crores which came to 5% of the total turnover of the assessee company. It was also noticed by him that the assessee is a pioneer in automated glass selling industry and holds about 75% market share which is not relevant for deciding the present issue however the facts which persuaded the CIT(A) to grant relief and holding that the TPO has wrongly concluded the assessee to be a contract manufacturer for its AE. The CIT (A), it is seen, has in order to establish the said assertion relied upon the table extracted at page 15 of his order where, in a tabulated chart, he notes that it demonstrates that import of raw material consumed was sourced from the AE was minimal and was much more from non-AEs and the total consumption of raw material sourced from the AE was only 19%. Similarly, stores and spares were largely imported from non-AEs and only 10% of the total import were from AE.

6.1 It is appropriate to extract the claim of the assessee before the CIT (A) from the impugned order as under :-

"The Ld. TPO while framing transfer pricing assessment alleged that payment of royalty to AE for exports is in nature of price reduction and in fact the assessee company is working as contract manufacturer.

The TPO has disregarded- the assessee claims that the total exports sales of the assessee is only 5.72% of its total sale. And assessee conducts sales to some OEM outside India through AE to utilize its capacity.

5.2 "Facts on exports sales by assessee to its AEs are at arm's length price of the international transaction

The assessee is a reputed manufacturer of Automotive Glass for automotive manufacturer segment in India selling and hold around 75% of market share in terms of sales. Total turnover of the assessee was around Rs. 1300 Crs out of which the export sale was Rs. 65 crs. which comes to 5% of the total turnover of the company

The assessee sales its product to almost all the manufacturer of automobile in India which includes Maruti Udyog Limited, Honda Motors Limited, Hyundai Motors India Limited, Mahindra & Mahindra, Volkswagen, Tata Motors, General Motors, Nissan, Ford, etc. The assessee is a pioneer in automotive glass selling industry and holds 75% market share. The assessee is a well known company listed on stock exchanges in India.

For Global presence, the assessee also produce glass for some OEM like Ford, General Motors etc. for their production facilities outside India. The export of glass is also commercially viable to assessee as the assessee earns better margins in exports.

Since the AE of the assessee is the Global leader in Automotive glass segment and is amongst top glass to suppliers to Vehicle manufacturer in larger volumes and tie ups with all leading automobile manufacturer globally. It is commercially better for the assessee to export through AE for better logistic and best payment terms. The assessee takes advantage of AEs reputation and business base to have exports on good commercial and price term with secured payment from AE.

The exports helps optimum utilization to production capacity and utilities.

For information of Your Honor, the AE of assessee is also manufacturing automotive / Float glass. The production capacity of producing glass of AE is much more - higher than of assessee in terms of volumns. Moreover the AE has presence in large number of country with tie up with large number of global car manufacturer.

The Goods produced by assessee are directly supplied to OMEs and doesn't used by AE for its manufacturing use etc.

5.3 The Ld TPO wrongly alleged that assessee performing on contract manufacturer for its AE, Facts of the issue.

The Ld TPO has alleged that assessee has purchase technology from AE, assessee is purchasing raw material from AE and thereafter exporting it to AE.

To reply to allegation of Ld. TPO its Important to understand the total purchase and sales, of the assessee with is submitted as under:

<i>Particular</i>	<i>Indigenous Purchase</i>	<i>Imported From Non AE</i>	<i>Imported From AE</i>	<i>Total Consumption</i>	<i>% of import from AE to total consumption</i>
<i>Raw Material consumed</i>	14336	10773	5863	30972	19
<i>Stores and Spares</i>	7852	1843	1092	10787	10

Your Honor will appreciate out of total consumption of raw material consumption. of the assessee less than 20% is procured from AE and similarly the import of exports of Stores.' & Spares is only 10% or total consumption of assessee.

For your reference Annual report of Asahi India Glass Limited is enclosed as annexure 5

The assessee purchase only a small portion of its requirement from AE and rest of the requirement is fulfilled from outside sources.

Further the purchase of raw material from AE does not only used to manufacture goods from AE but its used for manufacturing of goods to be sold to customers other than AE to. The assessee wish to remind that the export to AE is only 5% of the total turnover of assessee.

Further the royalty paid on sales to for doing sale of 94% sales to non AE & 6% sale to AE.

..... Your Honor will appreciate that the operation of the assessee does not depends on the exports to AE. The assessee has shown incremental in sale every year in past 10 years but the export to AE has not increase in the same tune. In fact the business of the assessee has grown tremendously in the years when to export was made to AE.

Your Honor should also consider that the export turnover to the assessee on the assessment year in appeal is highest ever. In most of the years the sale made to AE are less than 2%. Which proves that the business of assessee is not to job work instead the assessee do exports to AE whenever there is capacity is unutilized.

It is evident from the above reply that the assessee company is involved in the business of manufacturing glass and its sales are not dependent on the export sales to its AE.

We request your Honor to please allow the appeal and oblige.

5.4 . The assessee has place reliance on the matter settled by ITAT - Delhi - SonaOkegawa Precision Forgings Ltd. Versus Additional Commissioner of Income-tax, Range-9, New Delhi - 2011 (12) TMI 174 - ITAT DELHI - Income Tax."

6.2 The CIT (A), considering the submissions, facts and judicial precedent, reached the following conclusion :-

6.3 *The appellant is a reputed manufacturer of Automotive Glass for automotive manufacturer segment in India selling and hold around 75% of market share in terms of sales. The appellant has stated that the total turnover of the appellant company was around Rs. 1300 crores out of which the export sale was Rs. 65 crores, which comes to 5% of the total turnover of the appellant company. The appellant sells its product to almost all the manufacturer of automobiles in India which includes Maruti Udyog Limited, Honda Motors Limited, Hyundai Motors India Limited, Mahindra & Mahindra, Volkswagen, Tata Motors, General Motors, Nissan, Ford, etc. The appellant is a pioneer in automotive -glass selling industry and holds 75% market share. For global presence, the appellant also produce glass for some OEM like Ford, General Motors etc. for their production facilities outside India. The appellant has stated that the export of glass is also commercially viable to the appellant company as it earns better margins on exports. Since the AE of the*

appellant is the global leader in Automotive glass segment and is amongst top glass suppliers to Vehicle manufacturer in large volumes and tie ups with all leading automobile manufacturers globally. It is commercially better for the assessee to export through AE for better logistic and best payment terms. The appellant takes advantage of the reputation and business base of its AE to have exports on good commercial and price term with secured payment from AE. The appellant has stated that the TPO has wrongly treated the assessee as a contract manufacturer for its AE. The TPO has observed that the appellant has purchased technology from AE, the appellant is purchasing raw material from AE and thereafter exporting it to AE. In this regard the assessee has submitted the following chart in respect to the total purchase and sales of the appellant:

<i>Particular</i>	<i>Indigenous Purchase</i>	<i>Imported From Non AE</i>	<i>Imported From AE</i>	<i>Total Consumption</i>	<i>% of import from AE to total consumption</i>
<i>Raw Material consumed</i>	14336	10773	5863	30972	19
<i>Stores and Spares</i>	7852	1843	1092	10787	10

6.4 The appellant has submitted that the percentage of import from AE to total Consumption of Raw Material Consumed and Stores & Spares is 19% and 10% respectively. The appellant has stated that it purchases only a small portion of its requirement from AE and the rest of the requirement is fulfilled from non-AEs. The appellant has, stated that the business operation of the appellant is not dependent on the exports to AE. During the year the Exports to AE constitute only 2.63% of sale. In other years the sales made to AE are less than 2% of turn over. The appellant has argued that the appellant does exports to AE whenever there is unutilized capacity and the business of the appellant should not be treated merely as job works. The appellant has relied on the decision of the Hon'ble ITAT, Delhi i in the case of SonaOkegawa Precision Forgings Ltd. Vs Additional CIT [201~r 17 taxmann.com 141 (Delhi) wherein it has been decided as under :

"

2.2 The AO had referred the matter to the TPO, who came to the conclusion that there is no justification of payment of royalty to the AE. Two reasons were assigned for coming to this conclusion. Firstly, the assessee is a contract manufacturer and as per guidelines issued by OECD in paragraph nos. 6.14 and 6.17, there is no justification for payment of royalty in such a case. Secondly, the assessee has itself created provision for technical know-how separately as seen from the schedules of the audit report.....

2.4 Based upon the aforesaid finding furnished by the TPO, the royalty payable in respect of the goods supplied to the AE, quantified at Rs.14,47,956/-, has not been allowed. Thus, the total income in the draft order has been computed at Rs.17,02,97,707/-.

3. The learned Dispute Resolution Panel-II, New Delhi ('the DRP' for short) has approved this adjustment. The deduction of 5% has also not been allowed on the ground that under the amended proviso to section 92C(2), the adjustment is permissible only if the difference between the arm's length price arrived at by the AO and the assessee is less than 5% of the arm's length price shown by the assessee. Since the difference is more than 5%, the benefit is not available. Finally, the assessment order has been passed on 15. 10.2009 in accordance with the directions of the DRP by making an addition of Rs.14,47,956/- to the total income returned by the assessee.

4. Before us, the ld. counsel for the assessee submitted that similar issue arose in the proceedings of assessment year 2004-05 in the case of the assessee. The ld. CIT (Appeals) has deleted the disallowance made by the AD. The Tribunal has upheld the order of the ld. CIT(A). On the other hand, the ld. DR has relied on the orders of the AD and the DRP.

5. We have considered the facts of the case and submissions made before us. It is seen that the main question is whether the royalty paid by the assessee @ 3% of the net sale price stands justified under CUP. The assessee has placed on record a copy of the letter dated 30.04.1993 written by the Reserve Bank of India, Exchange Control Department, to Sona Steering Systems Ltd., in which payment of royalty @ 3% on domestic sales was allowed to be paid for a period of five years. There are similar other correspondences which have been placed on record. The assessee has also placed on record a press note issued by the Government of India, Ministry of Commerce, and Industries, Department of Industrial Policy & Promotion, issued in', 2003, under which royalty payment @ 8% on export sales and 5% on domestic sales have been referred to be reasonable for the purpose of processing approval of payments. On the other hand, the AD failed to bring any material on record that payment of royalty @ 3% was not at arm's length. Therefore, the payment stands justified under the CUP method. The second aspect is whether the assessee is a contract manufacturer for the AE. In this connection, it is seen from the order of the TPD itself that only a fraction of goods manufactured by the assessee have been sold to the AE. Bulk of sales are to uncontrolled parties. Thus, the assessee is not a captive manufacturer supplying all manufactured goods to the AE. In fact, the technology has been used for manufacturing and supplying goods to independent parties also. Therefore, it cannot be said that the assessee is a contract manufacturer.

5.1 Accordingly, we are of the view that there was no justification for disallowance of royalty paid in respect of goods supplied to the AE. .. "

6.5 The facts of the present case are exactly similar to the facts as in the case of SonaOkegawa Precision Forgings Ltd (supra). Respectfully following the decision of

the Hon'ble ITAT, Delhi in the case of SonaOkegawa Precision Forgings Ltd (supra), I hold that the appellant is not a contract manufacturer of its AE. Accordingly, the AO /TPO is directed to delete the adjustment of Rs.58,82,458/- on account of royalty paid to its AE. This ground of appeal is allowed."

6.3 On going through the above reasons on facts as they stand, we find no infirmity in the order. We note that the sole reason which prevailed with the TPO to hold that the assessee was a contract manufacturer was that since the assessee had paid royalty to its AE where the assessee's business model showed that the purchases were made only from the AE, the products were also exported to AE, the royalty was thus paid for exports made to the AE. In the circumstances, it was disallowed taking the assessee to be a contract manufacturer. On facts as it transpired, the inferences of the TPO were not correct. The CIT (A) appraising the facts noted that there were negligible purchases of raw material from the AE and the total sales to its AE were also negligible. In the facts of the present case, we note that it has not been disputed by the Revenue that the total export sales of the assessee to the AE was only 5% of its total sales and the assessee conducts sales to some OEM outside India through the AE to utilize its capacity. Some of these companies are Ford, General Motors, etc. for their production facilities outside India and since the AE of the assessee is a global leader in automotive glass segment, the assessee takes advantage of the AE's reputation and business base "to have exports on good commercial and price terms with secured payment from the AE for better logistic and best payment through the AE". In the facts of the present case, the goods produced by the assessee are directly supplied to the OEMs and in the circumstances, out of the total consumption of raw material consumed by the assessee which, it has been noticed, is less than 20% procured from the AE and import of stores and spares from the AE is also 10% of the total consumption. The allegation of the TPO that the assessee has purchased raw material from the AE and is exporting again to the AE in the facts of the present case is misplaced. At the cost of reiteration, the export to the AE is only 5% and royalty paid on sales to the extent of 94% is for sales to non-AE and only 6% sale to the AE. The inferences drawn by the TPO, it is found, were de hors facts. It is also being claimed on behalf of the assessee that the export turnover of the assessee over the years has been reducing and most of the years, sales made to the AE is less than 2%. Be that as it may, in the facts of the present case, we find that where admittedly from the turnover of Rs.1,300 crores, the export sales is only Rs.65 crores and noting the fact that the assessee is domestically selling its product to Maruti Udyog

Ltd., Honda Motors, Hyundai, Toyota, Mitsubishi, VoxWagon, General Motors, Skoda and Tata Motors, we find that the appeal of the Revenue on facts has to be dismissed. The reliance placed by the assessee and accepted by the CIT (A) on the case of SonaOkegawa Precision Forgings Ltd. vs. Addl.CIT – (2012) 17 taxmann.com 141 (Delhi), we find in the facts of the present case fully supports the relief granted. Accordingly, being satisfied by the reasoning and finding, the appeal of the Revenue is dismissed.

7. In the result, the appeal of the Revenue is dismissed.

Order pronounced in open court on this 03 day of August, 2018.

Sd/-

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

sd/-

**(DIVA SINGH)
JUDICIAL MEMBER**

**Dated: the 03 day of August, 2018
VS (Del)./Poonam (Chd.)/TS(Del.)**

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

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ITAT NEW DELHI