

**IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH 'B', CHANDIGARH**

**BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER**

ITA No.60/Chd/2013
Assessment Year: 2008-09

M/s Punjab Chemicals & Crop. Vs. The Addl. CIT
Protection Ltd. Range IV
SCO 417-418, Sector 35-C Chandigarh
Chandigarh

PAN No. AAACP9904H

ITA No.100/Chd/2014
Assessment Year: 2009-10

M/s Punjab Chemicals & Crop. Vs. The DCIT
Protection Ltd. Circle 4(1)
SCO 183, Madhya Marg Chandigarh
Sector 26, Chandigarh

(Appellant)

(Respondent)

Appellant By : Shri. Anil Khanna
Respondent By : Mrs. Mona Mohanty

Date of hearing : 16/07/2018
Date of Pronouncement : 23/07/2018

ORDER

PER DR. B.R.R. KUMAR, A.M:

Both the above appeals have been filed by the Assessee against the separate order of the DRP-1, New Delhi.

2. Appeal wise ground reproduced hereunder:

Grounds of appeal in ITA No. 60/CHD/2013:

1. As per the facts and circumstance of the case and as per the provisions of law, the Dispute Resolution Panel has erred in directing and assessing officer has erred in disallowing Rs. 2,75,831 on account of payment to the widow of the deceased Managing Director by treating the same as personal expenditure and non business expenditure. The same be allowed being allowable as business expenditure.

2. As per the facts and circumstance of the case and as per the provisions of law, the Dispute Resolution Panel has erred in sustaining and assessing officer has

erred in disallowed Rs. 5,07,79,000 on account of Building Repairs - Rs. 38,44,000.; Machinery Repairs - Rs. 4,23,79,000/- and other Repairs - Rs. 45,56,000 respectively, treating the same as addition to fixed assets. The same being revenue expenditure be allowed as current repairs or business expenditure.

3. As per the facts and circumstance of the case and as per the provisions of law, the Dispute Resolution Panel has erred in upholding and the assessing officer has erred in disallowing the deduction of Rs. 30,77,524 being revenue and business expenses pertaining to A.Y 2008-09 but booked in A.Y. 2009-10 as previous year expenditure. This being allowable as business expenditure, the disallowance made on this account be deleted. Alternatively clear directions be given for allowance of the above expenditure in the A.Y. 2009-10.

4. As per the facts and circumstance of the case and as per the provisions of law, the Dispute Resolution Panel has erred in its directions, and the assessing officer has erred in disallowing Rs. 50,00,000/- being commission paid to directors. The same being allowable as business expenditure, the disallowance made on this account be deleted.

5. As per the facts and circumstance of the case and as per the provisions of law, the Dispute Resolution Panel has erred in its directions, and the assessing officer has erred in disallowing interest of Rs. 2,13,36,000/- under provisio to section 6(1)(iii). This being allowable as business expenditure, the disallowance made on this account be deleted. Alternatively the depreciation has been wrongly computed the same be computed as per the facts of the case.

6. As per the facts and circumstance of the case and as per the provisions of law, the Dispute Resolution Panel has erred in its directions, and the assessing officer has erred in disallowing Rs. 34,60,940/- u/s 14A of the Income Tax Act, 1961 out of interest and other expenses. The disallowance made on this account be deleted.

7. As per the facts and circumstance of the case and as per the provisions of law, the Dispute Resolution Panel has erred in its directions and the assessing officer has erred in making addition on account of mark up of Rs. 31,73,8097/- in the reimbursement of expenses claimed from overseas AE. The same be deleted.

8. As per the facts and circumstance of the case and as per the provisions of law, the Dispute Resolution Panel has erred in its directions and the assessing officer has erred in adding Rs. 3,62,80,770 on account of the difference calculated in the amount of arm's length value of corporate guarantee charges and the charges received by the assessee from its Associated Enterprises under the international transactions. The same be deleted.

9. As per the facts and circumstance of the case and as per the provisions of law, the assessing officer has erred in not applying special tax rate of 10% under section 111A on short term capital gain of Rs. 20,82,150 reflected in the returns of income tax on which STT was paid. The same be charged as per the provisions of law.

10. As per the facts and circumstance of the case and as per the provisions of law, the assessing officer has erred in not allowing tax credit eligible u/s 115JAA as detailed below from the tax payable:

| | |
|----------------|---------------|
| A.Y. 2006-2007 | Rs. 96,06,301 |
| A.Y. 2007-2008 | Rs. 60,00,505 |

The same be allowed as per the provisions of law.

11. per the facts and circumstance of the case and as per the provisions of law, the assessing officer has erred in not calculating Interest u/s 234B after allowing the tax credit u/s 115 JAA and taxes paid. The same be recomputed as per the provisions of law.

Grounds of appeal in ITA No. 100/CHD/2014:

1. As per the facts and circumstance of the case and as per the provisions of law, the Dispute Resolution Panel has erred in its directions, and the assessing officer has erred in disallowing interest of Rs. 3,48,43,160/- under provisio to section 36(1)(iii). This being allowable as business expenditure, the disallowance made on this account be deleted.

2. As per the facts and circumstance of the case and as per the provisions of law, the Dispute Resolution Panel has erred in its directions, and the assessing officer has erred in disallowing Rs. 40,12,319/- u/s 14A of the Income Tax Act, 1961 out of interest and other expenses. The disallowance made on this account be deleted.

3. As per the facts and circumstance of the case and as per the provisions of law, the Dispute Resolution Panel has erred in its directions and the assessing officer has erred in adding Rs. 2,06,27,610 on account of the difference calculated in the amount of arm's length value of corporate guarantee charges and the charges received by the assessee from its Associated Enterprises under the international transactions. The same be deleted.

3. Ground No. 3, 9, 10 and 11 are not pressed by the assessee and hence needs no adjudication.

4. Ground No. 1 relates to disallowance of payment to widow of Managing Director(MD):

4.1. The entire facts of the issue dealt by the Assessing Officer is as under:

Payment to Ex-MD's Wife :- From the notes to a/cs and from the replies filed by the assessee, it was seen that an amount of Rs.2,75,831/- has been paid during the year to Mrs. Shaila Shorff W/o late Ex Managing Director of the company as part of the annual retirement benefits being given to her. When confronted on this issue the assessee in its reply has submitted that:

"A NOTE ON THE RETIREMENT BENEFITS BEING PAID TO SMT. SHAILA S SHROFF WIFE OF THE FORMER MANAGING DIRECTOR, SHRIS.D. SHROFF.

Shri S.D. Shroff was appointed as the Director of the Company on 19th June, 1984. With effect from 1st April 1985, he was appointed as the Managing Director of the company and he continued to occupy the position till the date of his demise i.e. on 18th December, 1997.

During his tenure in the office of the Managing Director of the Company, he worked very hard for bringing and setting up new project in the company. He made the company strong with overall infrastructure facilities, technical up-gradation and with a committed and dedicated human force.

The contribution of Shri S.D. Shroff, former Managing Director of the Company in the growth of the Company and its employees is noteworthy.

He was the person, who always cared for the employees and their family members. His technical capabilities took the company to great heights. His perspective to make the Company a global Company, became true in 1998,

when the Company's exports touched 53.3% of the total turnover of the Company. The commencement of production of new specialized chemicals and herbicides for international market also took the Company to new heights and with the continued Company's growth. He was a teacher and guide to the PCCPL team. He was a friend of everybody, who came in his contact. He was always helpful to the PCCPL family members and was always ready to find out some way to help them. He had the deep concern about the clean environment and always advocated for those equipments, which were environmental friendly and safe while working. He was extremely punctual and always stressed that the time is precious and will never come back.

He was a great social worker and was always ready for the welfare of the society, particularly for up liftment of education of the children.

During Mr. Shroff's tenure as the Managing Director, the Company achieved overall growth. The Turnover of the Company for the year 1997-98 was Rs. 60 crores as compared to Rs. 4 crores in the year 1984-85. Mr Shroff initiated new projects for the Company, established innovative infrastructure facilities, achieved a high degree of technical up-gradation and, by his sterling example, spurred the staff to work with a sense of commitment.

In recognition of long and distinguished services rendered to the Company by late Shri S. D. Shroff, it was decided to provide for the welfare of his widow, Smt. Shaila S Shroff and to sanction certain benefits to her, for her lifetime.

After considering all the above points, the Board of Directors of the Company passed the following resolution.

"RESOLVED THAT subject to the approval of the Shareholders in General Meeting the Company do make provision for the welfare of Smt. Shaila S Shroff, widow of Shri S.D. Shroff, former Managing Director of the Company and to sanction certain benefit, to her for her lifetime commencing on 1st January, 1998.

RESLVED FURTHER THAT the proposed provisions to be made and benefits to be given to Smt. Shaila S Shroff are to include:

- a. Such amount by way of monthly payment for her lifetime, equivalent to 50% of the last drawn salary by Shri S.D. Shroff.
- b. A one time ad-hoc ex-gratia payment not exceeding a sum of Rs. 10 lacs.
- c. Reimbursement of expenses incurred by her for treatment based on actual during her life time.
- d. Sale of the Company's car at the book value thereof.

Subsequently, the same was placed before the Annual General Meeting of the members of the company and the following resolution was passed.

"RESOLVED THAT in appreciation of the valued services of late Shri S.D. Shroff, who was the Managing Director of the Company from 1st April 1985 till the date of his death on 18th December, 1997, and with the view to look after the welfare of his widow, Smt. Shaila S. Shroff, the sanction and payment of the following benefits with effect from 1st January, 1998 to the said Smt. Shaila S Shroff be and it is hereby approved and consented to:

1. One time ex-gratia payment of Rs. 10 lac (Ruppees ten lacs only)
2. Monthly payment of Rs. 17,500/- for the life time which is equivalent of 50% of the salary last drawn by Shri S. D. Shroff as the Managing Director.
3. Reimbursement of all actual medical expenses incurred by her for her own medical treatment during her life time.
4. Sale to her a car belonging to the Company at its book value as per the books of the Company. "

Accordingly, the aforesaid benefits are being paid to Smt. Shaila Shroff, widow of late Shri S.D. Shroff, Ex-Managing Director of the Company with necessary approval of the Board of Director as well as the Members of the Company.

This issue has been upheld by the Chandigarh Bench of IT AT vide their order dated 21.11.2006 for A. Y. 1999-2000 copy enclosed"

4.1 In response to the show cause regarding the allowability of these retirement benefits being paid to the wife of late Ex Managing Director of the company, the assessee submitted that the submission in this regard are the same which were filed last year and now these are reproduced below:-

"Under the similar facts considered by the Hon'able IT AT, Chandigarh Bench, this ground has been allowed in the case of the assessee company vide ITA NO. 347/Chandi/2005 - Punjab Chemicals & Crop Protection Ltd. Vs. ACIT Circle 4(1) dated 21.11.2006 for the Assessment Year 1999-2000 as well as vide ITA 528/Chd/2010 for A.Y. 2006-07. Copy of the orders are enclosed".

4.2 During the assessment proceedings, it was observed that this special privilege had not been given or allowed to any other director of the assessee or his family members. Further, this expenditure in no way can be stated to be incurred wholly and exclusively for the business purpose. For the A.Y's. quoted by the assessee, the department is in appeal before the Hon'ble Punjab and Haryana Court on this issue. Therefore, an amount of Rs.2,75,831/- was being disallowed and added back to the income of the assessee.

4.3 On this issue also, the assessee went before the Hon'ble DRP and took the plea that as per the facts and circumstances of the case and as per the provisions of law, the assessing officer has erred in disallowing Rs.2,75,831/- on account of payment to the widow of the deceased Managing Director by treating the same as personal expenditure and non business expenditure. Further it has been requested that the same be allowed being allowable as business expenditure.

Hon'ble DRP considered the submissions of the rival parties and vide Para 4.2 of its order held that it declines to interfere with AO's order since the department has filed an appeal before the Hon'ble High Court for the AY 2004-05 on the same issue and the matter has not yet reached judicial finality. Accordingly, action of the Assessing Officer is sustained on this point.

4.5 In view of the above, an amount of Rs.2,75,831/- is disallowed and added back to the income of the assessee. Penalty proceedings u/s 271(l)(c) of the Income Tax Act, 1961 have been initiated separately for furnishing inaccurate particulars of income to the tune of Rs. 2,75,831/-.

4.2. The issue stands adjudicated by the order of the ITAT for the A.Y. 2006-07 which is as under:

3. The learned AR for the assessee at the outset pointed out that the issue in the present appeal is covered, by the orders of the Tribunal in assessee's own case relating to Assessment Year 1999-2000 in ITA No; 347/Chandi/2005 and ITA No. 69/Chandi/08 relating to Assessment Year 2004-05.

4. The only issue arising in the present appeal is against the deletion of disallowance made on account of payment to widow of the deceased Managing Director being personal and non business expenditure. The assessee is

in the business of manufacturing of yarn and knit wears and the over all growth was attributed to the Managing Director, Shri S.D. Shroff. The Board of Directors of the company, resolved to look after the welfare of his widow Smt. Shaila S. Shroff and it was resolved that one time ex. gratia payment of Rs. 10 lac. including monthly payment of Rs. 17,500/- for the life time plus, reimbursement of all annual medical expenses was to be incurred by the assessee company. The said expenditure was disallowed being not wholly arid exclusively for the business. Similar expenditure was claimed in the earlier year but Assessing Officer did not allow the claim of assessee as appeals were pending before the Hon'ble Punjab & Haryana High Court in the case. The CIT(A) allowed the claim of the assessee in view of the ratio laid down by the Tribunal in ITA No. 347/Chandi/2005 relating to Assessment Year 1999-2000 and in ITA No. 69/Chandi/2008 relating to Assessment Year 2004-05. The operative paras of the order of the Tribunal are reproduced at pages 4 to 6 of the appellate order

5. We find that the issue in the present appeal is identical to the issue raised in the earlier years and respectfully following the ratio laid down by the Coordinate Bench of the Tribunal, we confirm the order of CIT(A) in allowing the claim of the assessee. The operative portion of the order of the Tribunal in this regard is part of the order of CIT(A) and we place our reliance on the same. We uphold the order of the CIT(A) and dismiss the ground of appeal raised by the Revenue.

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

4.3. Since the matter stands adjudicated by the coordinate bench of ITAT, in favour of the assessee in the earlier Assessment Years 1999-2000, 2006-07 in the absence of any other change in the facts, we hereby delete the addition made by the Assessing Officer.

5. Ground No. 2 relates to addition on account of repairs:

5.1. The entire facts of the issue dealt by the Assessing Officer is as under:

7. Repair to Machinery building Etc: During this year the assessee has shown repair on machinery and building as under:

| | |
|---------------|-----------------|
| Machinery | Rs. 423.79 lacs |
| Building | Rs. 38.44 lacs |
| Other Repairs | Rs. 45.56 lacs |
| Total | Rs. 507.79 Lacs |

5.1 The assessee was asked why not this major expenditure on repair be allowed to be capitalized instead of allowing it as revenue expenditure as it amounts to a major value addition to the fixed assets and the allowable depreciation would be allowed accordingly. In response to this, the assessee submitted vide its reply dated 14.12.2011 in Para no. 5 as under :-

"Repairs Buildings Rs. 54.49 Lacs, Machinery Rs. 578.22 lacs. Others Rs. 45.96 lacs:
At the outset it is clarified that these figures have been picked up from the consolidated accounts which is not relevant for the assessment purposes. The figures as per standalone accounts are as under:

| Account Head | Amount Rs. in lacs |
|-----------------|--------------------|
| Building Repair | 38.44 |
| Machinery | 423.79 |
| Others | 45.56 |

Copies of the account of the above are enclosed at Annexure-7.

In respect of the specific query regarding the allowance of machinery repairs it is submitted that:

- a. These repairs are of the nature of current repairs allowable u/s 31 of the Income Tax Act, 1961.
- b. Even otherwise the expenditure has been incurred exclusively and wholly for the purposes of the business of the company and hence is allowable u/s 37(1).
- c. The Gross Value of plant and machinery and electric installations is Rs. 12925 lacs and the repairs to this is around 3.22% of the cost. The plant being of the nature of chemical plant, it comes in contact with corrosive chemicals constantly and requires regular repairs particularly repairs of the vessels for mixing purposes besides the insulation of the piping structure.
- d. During the previous year also similar expenses have been incurred and have been allowed.
- e. the expenditure which is claimed as an expenditure for repairs is done to preserve and maintain an already existing asset. The object of the expenditure is not to bring a new asset into existence, nor is its object the obtaining of a new or fresh advantage

f. The actual addition to plant to the tune of Rs. 1561.44 lacs have been capitalized separately. Besides this the addition on account of amalgamation of IA & IC Chem Pvt Ltd. and Puraj Chemicals Pvt Ltd to the tune of Rs. 335.02 lacs have been separately considered in the accounts.

g. The quantum of the repairs is not relevant so far as the allowance of expenditure is concerned. It has been held that:
Whether a particular repair really needed at a relevant period or not or what is the amount to be spent are matters to be decided by the assessee as it is his province to take appropriate measures at a proper time. Repair may be a major repair spending considerable amount of money but that alone would not take away its character as repair - Nathmal Bankatlal Parikh & Co. v. CIT[1980] 122ITR 168 (AP)(FB).

They are such repairs as are attended to as and when need arises and that the question when a building, machinery, etc. requires repairs and when the need arises must be decided not by any academic or theoretical test but by the test of commercial expediency. The test evolved in New Shorrock Spg. & Mfg. Co. Ltd. 's case is the most appropriate one having regard to the context in which the said expression occurs - Ballimal Naval Kishore v. CIT [1997] 90 Taxman 402/224 ITR 414 (SC). "

5.2 The above reply of the assessee was considered and in the draft assessment order, it was held that all these expenses on the repair of the fixed assets tantamount to value addition in fixed assets. Therefore, addition of Rs. 507.79 lacs was made to the total income of the assessee. The assessee was allowed to capitalize this expenditure and depreciation on it was allowed as per law.

5.3 Against the above said proposed addition, the assessee went before the Hon'ble DRP and took a plea that as per the facts and circumstances of the case and as per the provisions of law, the assessing officer had erred in disallowing Rs. 5,07,79,000/- on account of Building Repairs - Rs.

38,44,000/-, Machinery Repairs- Rs.4,23,79,000/- and other Repairs- Rs. 45,56,000/- respectively, treating the same as addition to fixed assets. The assessee requested that the same be allowed being allowable as business expenditure.

5.4 On this issue, the assessee also took an alternative plea before the Hon'ble DRP that the depreciation on the above be allowed as per the provisions of law as the same has been considered as addition to the fixed assets.

5.5 Considering the facts of the case, the Hon'ble DRP vide para 4.3 of its order dated 25-09-2012 stated that though the AO vide his draft assessment order had considered the expenditure as capital expenditure and also stated that depreciation would be allowed as per law, but the same had not been computed. The assessee on the other hand stated these expenses are fully allowable u/s 37(1) being on account of repairs to existing assets. Accordingly, the Hon'ble DRP sustained the addition made by the Assessing Officer. However, the Assessing Officer has been directed to allow depreciation at appropriate depreciation rates as decided by him in Para 5 of his draft assessment order.

5.6 In view of the above, addition of Rs. 507.79 lacs is hereby made to the total income of the assessee being expenditure capitalized on account of addition to fixed assets.

5.2 The DRP held that "the Assessing Officer has held that the expenditure has been a value addition to the assessee and it should be capitalized but depreciation should be allowed. The action of the Assessing Officer is sustained but he is directed to allow depreciation at appropriate depreciation rates as directed by him at para 5 of his order."

5.3 Thus we find that the contentions of the assessee are summarily rejected by the DRP. To either sustain or delete the addition the factual content of details of repairs incurred whether the repairs partake the character of creation of a new asset or maintenance of the old asset has to be examined in detail by going through each group of expenditure incurred by the assessee so as to arrive at a correct decision of treating the expenditure either as Revenue or capital. The Ld. Representatives of both the parties have fairly consented to examine the matter by the Assessing Officer. Hence, the matter is being remanded back to the file of the Assessing Officer for reexamination and to take a decision as per the details submitted. The Assessing Officer would be free to make any enquiry as deemed fit to come to a correct conclusion.

5.4 As a result, this ground of appeal is allowed for statistical purposes.

6. Ground No. 4 relates to disallowance of commission:

6.1 The entire facts of the issue dealt by the Assessing Officer is as under:

9. Commission to Directors:- During the year under consideration, the assessee claimed commission amounting to Rs. 50,00,000/- paid to the directors. The assessee filed resolution dated 30.08.2007 and from the resolution it was not clear to whom the commission was payable. The resolution is general in nature which says that the payment of commission to the Directors of company others than Managing Director and whole time directors be authorized subject to the approval of Central Govt, if and when required. The resolution is silent about the names of the directors to whom the commission is payable and also silent on the nature of services to be performed in lieu of commission. The assessee also filed the resolution dated 14.06.2008 i.e. after the close of Financial Year which authorized the commission to Sh. Shalil S. Shroff amounting to Rs. 10,00,000/- , Sh. Avtar Singh and Sh. S.S. Tiwari whole time Director amounting to Rs. 10-lacs to each one and Rs. 5 lacs to Smt. Rupam Shroff whole time director. From the perusal of both resolution, it is clear that the resolution dated 30.08.2007 does not authorized the commission to managing and whole time directors where as the resolution dated 14.06.2008 authorizes the commission to managing and whole time directors. The assessee had not paid commission any directors during the year under consideration; only provision as on 31.03.2008 had been made. It was also seen that the assessee had not deducted TDS on commission of Rs. 15,00,000/- paid to non working Directors. The assessee alleged that the payment was not covered in Commission and brokerage u/s 194H of I.T. Act. The reply of assessee was carefully considered and not accepted as TDS is required to be deducted u/s 194 H on commission paid to any person and, therefore, addition of Rs. 15,00,000/- is made u/s 40(a)(ia) of I.T. Act. Further the commission of Rs. 3.5 Lacs paid to managing and whole time Directors was also disallowed as the resolution passed in general meeting dated 30.08.2007 did not authorize the commission to Managing Directors and whole time directors and the resolution after the close of financial year in board meeting dated 14.06.2008 did not specify the nature of work performed by the managing and whole time directors in lieu of commission given.

9.1 From the total facts, it is clear that the resolution dated 14.06.2008 passed in board meeting is an afterthought and a colorable device to reduce the taxable income of the company particularly it is common practice to give fix monthly remuneration in the form of salary who work for the company as employee of the company. The provision of commission in accordance with board resolution after the close of financial year is not justified in view of facts quoted supra. And therefore commission of Rs. 35 Lacs was also disallowed.

9.2 In view of above the total commission of Rs. 50 Lacs was disallowed and added to the total income of the assessee.

9.3 The assessee pleaded before the Hon'ble DRP that as per the facts and circumstances of the case and as per the provision of law, the assessing officer had erred in disallowing Rs. 50,00,000/- being commission paid to directors. Thus, the same being allowable as business expenditure, the disallowance made on this account be deleted.

6.2 The DRP held as under:

Ground No.8: The assessee objected to the proposer disallowance of Rs. 50 lakhs being commission paid to directors. The A.O. has proposed disallowance of Rs. 35 lakhs commission payment to working directors and Rs. 15 lacs paid to non working Directors. The A.O. has proposed disallowance on the ground that in respect to Managing Director and working Directors, the Board's resolution has been passed on 14.6.08 i.e. after the close of the financial year and is, therefore, an afterthought. Regarding non working directors, no TDS was deducted from commission and hence the claim is disallowable u/s 40(a)(ia). Thus in all Rs. 50 lacs has been disallowed.

Finding

While payment of commission alongwith salaries is a common business practice in the instant case the authorization to pay the commission to the M.D. and working directions came after the closure of books on 31.3.2008. This indicates that liability arose in the next year and, therefore, even on purely accounting norms, Rs. 35 lacs cannot be an ascertained liability of the previous year relevant to AY 2008-09. Therefore, the provisions of Rs. 35 lacs have been correctly disallowed by the A.O. and the disallowance is sustained. Regarding Rs. 15 lacs commission paid to non executive directors, the A.O. has proposed disallowance on non fulfillment of TDS provisions of Sec. 194H. In the opinion of the DRP, the correct TDS section is Sec. 192 as commission for these non executive directors partakes the colour of salary. The definition of salary in Section 15 & 16 of the Act includes "commission" as part of "salary". This being the case, the A.O. is directed to examine whether in respect to non executive directors, TDS has been properly deducted as per the provisions of Sec. 192 and if so delete the addition of Rs. 15 lacs. Alternatively if TDS is not deducted u/s 192, the disallowance u/s 40(a)(ia) would be upheld.

6.3 It was held that Rs. 35,00,000/- is an unascertained liability and Rs. 15,00,000/- was not subjected to provisions of the TDS.

6.4 Before us, the Ld. AR submitted that the DRP has wrongly considered the commission to the whole time Directors was decided after 31/03/2008. Commission to Executive Director was decided in the resolutions passed in the General Meeting held on 28/12/2005, 07/09/2006 and 31/05/2006. It was submitted that TDS was also deducted, however no TDS was deducted on the commission paid to non working Directors as no provisions of TDS were applicable for the year in question.

6.5 The Ld. DR argued that the TDS is equally applicable to the whole time Directors, Executive Directors and also Non Executive Directors. Since the matter requires verification of facts at the end of the Assessing Officer, we hereby remand the matter back to the file of the Assessing Officer for verification.

6.6 As a result this ground of appeal is allowed for statistical purposes.

7. Ground No. 5 relates to disallowance under section 36(1)(iii):

7.1 Brief facts of the case are that the assessee has incurred capital work in progress of Rs. 30.08 Crores, the total borrowed funds being Rs. 181.72 Crores up to the current year. The funds available till march 2007 were of Rs. 130.30 Crores. Hence the Assessing Officer held that, the assessee had substantial increase in the loans during the year under consideration and since the expansion has not been completed at the end of the year the interest incurred on the loans is required to be capitalized under section 36(1)(iii). The assessee has already capitalized Rs. 1.47 Crores and the remaining Rs. 2.13 Crores have been added

to the total income by the Assessing Officer by allowing depreciation on the capitalized assets.

7.2 Before us, the Ld. AR argued that there has to be a nexus between the borrowings and acquisition of an asset. The company has already capitalized the interest on such loans. For the rest of the investments in CWIP the assessee argued that there was sufficient cash flows from year to year ranging from Rs. 6.47 Crores to Rs. 53.73 Crores. It was argued that in the year 2007-08 alone Rs. 53.73 Crores funds were generated which are sufficient to cover even the entire capitalization.

7.3 Ld. DR argued that the profits generated from the year 1996-97 to 2007-08 have been shown as invested in the CWIP, hence, it is required to be looked into the entire structuring of capitalization for the earlier years also so as to arrive at the funds availability at the end of the year and corresponding CWIP.

7.4 Having gone through the arguments and perusal of records, we deem it appropriate to remand the matter back to the file of Assessing Officer to determine the availability of the funds, utilization for capital work in progress, examine the utilization of the loans, determine the nexus between the loans taken and CWIP and then take a decision of disallowance on consideration of all the relevant facts as required under section 36(1)(iii) as per the provisions of Income Tax Act, 1961.

7.5 This ground of appeal is allowed for statistical purposes.

8. Ground No. 6 relates to Disallowance under section 14A:

8.1 During the year the assessee has earned dividend of Rs. 6.74 Lacs against the standing investment of Rs. 383.40 Lacs. The Ld. AR argued that disallowance of Rs. 34.60 Lacs is bad in law as all the investments were made in the years 1996-97 and 1997-98. The Ld. AR argued that the cash generated from operating activity is of Rs. 36.38 Crores and no borrowings have been done for this investment during the year.

8.2 Ld. DR argued that the matter may be referred back to Assessing Officer to determine the disallowance in view of the recent judgments of the Hon'ble Supreme Court in the case of Maxopp Investment Ltd. and in the case of Godrej Boyce Manufacturing Co. Ltd.

8.3 We are in agreement that in any case the availability of the own funds are directed to be examined in relation to the ground no. 5 above and hence the Assessing Officer is directed to examine this issue also and take a decision keeping in view the judgments of the Apex Court.

8.4 This ground of appeal is allowed for statistical purposes.

9. Ground No. 7 pertains to mark up of reimbursements:

9.1 The TPO has considered professional charges paid to third party and recovered from AE as a marketing support service by the assessee to the AE and charged @12.5% for lending rate and 2.5% entrepreneurial efforts.

9.2 The DRP deleted the addition of 2.5% made on account of entrepreneurial efforts.

9.3 Before us, it was argued that the amount has been paid to M/s Moti Lal Oswal and Company and other services of advisory and professional charges.

9.4 Before us, the Ld. AR argued that the assessee company incurred certain expenses for and on behalf of AE which were revenue neutral. These have been charged by the assessee company on actual basis to the AE.

9.5 The TPO has considered the same as marketing support services and has marked up the same @ 15% .

9.6 It was argued that all these expenses are not of the nature of marketing support services. These are expenses which have been incurred by the Assessee Company and are revenue neutral. These have been charged by the assessee company on actual basis. There cannot be any income arising out this transaction. The assessee company is not in the line of providing acquisition services. Whatever expenses have been incurred for acquiring a particular AE has been charged to them.

9.7 It was argued based on the rationale in the case of Aricent Technologies (Holdings) Ltd that payment received by the assessee company from its AE /parent company was in the nature of reimbursement of incentives paid to the employees of the assessee and it did not have any element of income and therefore, no adjustment could be made in the computation of ALP by nationally imputing a mark up on that amount, more so when no

such adjustment has been made in the earlier or subsequent years wherein also similar incentives were paid and the facts were identical.

9.8 Further the Ld. AR argued that when the transactions of one nature are compared the comparison has to be made on transaction level and not on entity level. The transactions compared are different than in the case of the assessee company which is the reimbursement of expenses actually incurred by the company and which are revenue neutral.

9.9 He relied on the judgment in the case of Dy. CIT vs. Ankit Diamonds (2011) 81TR 487 (Mum.)(Trib.) which held that under Chapter X of the Income Tax Act, 1961, the determination of the arm's length price of an international transaction has to be only at the transaction level or at a class of transactions. The law does not permit determination of the arm's length price of international transactions, by comparing margins at entry level or by taking overall industry level averages. The matter was set aside.(A. Y. 2002-03)

9.10 It was argued that in view of above judgments Ld. AR argued that since the reimbursement of expenses claimed from AE are not of the nature of marketing services, and being revenue neutral, does not include any element of income and hence no mark up is required.

9.11 Ld. DR argued that as per the page 3 of TPO's order the AE wholly owned subsidiary companies of the assessee and argued that the entities namely SD Agchem (Europe) NV (100% subsidiary), SD Agchem (Netherlands)NV (100% subsidiary), Agrichem B.V., The Netherlands (100% subsidiary), STS Chemicals(UK) Ltd. (100% subsidiary), Sintesis Quimica S.A.I.C., Argentina (85% subsidiary) hence it cannot said that the adjustment made by the TPO is wrong.

9.12 We have heard the arguments and found that that the assessee was in the process of acquisition of these entities and the chart depicted by the TPO is the post acquisition chart and the pre acquisition details required to adjudicate the basic fact of incurring the expenditure have not been proved. Hence the matter is remanded back to the file of the DRP to obtain the required details and take a decision accordingly.

10. Ground No. 8 relates to addition on account of corporate guarantee charges:

10.1 Brief facts of the case are that a company has given corporate guarantees to tune of USD 7 Million, dt. 13/12/2006 through the State Bank of India, Euro 7.5 Million, dt. 06/07/2007 through the Bank of India and USD 1 Million dt. 22/06/2007 through the State Bank of India.

10.2 The TPO observed that it is an independent clause of International Transaction and after having considered the same as high risk and added 200 basic points to rate of 2.61 and 2.76 and arrived at ALP of 3.62 Crores. TPO considered CUP as the most appropriate method, rebutting the arguments of the assessee that the providing of guarantees is in the interest of the assessee.

10.3 The DRP has not given any reasoning accepting the bench marking charge @ 4.61% to 4.76 %. The Ld. AR argues that the rate of guarantee commission bench marked at 0.5% in most of the cases and also argued that there is no provision in the Income Tax Act,1961 which determines the calculation of ALPs in case of Corporate Guarantees hence the matter is being referred back to the DRP to pass a speaking order meeting the objections of the assessee.

11. As a result, both the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open Court.

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER

Sd/-
(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER

Dated : 23/07/2018
AG

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR