



IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.1070/Mum./2014
(Assessment Year : 2008-09)

Elkem South Asia Pvt. Ltd.
(Formerly known as Orkla India P. Ltd.)
307/308, B-Wing, 3rd Floor
BSEL Tech Park, Sector-30
Navi Mumbai 400 705
PAN – AAACE2668M

..... Appellant

v/s

Dy. Commissioner of Income Tax
(OSD), Range-10(1), Mumbai

..... Respondent

Assessee by : Shri Nitesh Joshi
Revenue by : Shri T. Roumuan Paite

Date of Hearing – 23.01.2019

Date of Order – 22.04.2019

ORDER

PER SAKTIJIT DEY. J.M.

The aforesaid appeal has been filed by the assessee challenging the order dated 5th December 2013, passed by the learned Commissioner (Appeals)-15, Mumbai, pertaining to the assessment year 2008-09.

2. The dispute in the present appeal is confined to the addition of an amount of ₹ 24,54,556, on account of transfer pricing adjustment.

3. Brief facts are, the assessee company is engaged in the business of manufacturing ceramite mortar and trading in micro silica, foundry alloy. In the previous year relevant to the assessment year under dispute, the assessee had entered into a number of international transactions with its overseas AEs. However, in the present appeal, we are concerned with the international transaction relating to availing of services from the AEs for which an amount of ₹ 24,54,556, was paid by the assessee to the AE. In the transfer pricing study report, the assessee has benchmarked the aforesaid transactions by selecting Comparable Uncontrolled Price (CUP) method as the most appropriate method and has claimed that the amount paid towards availing such services is at arm's length. In the course of proceedings before him, the Transfer Pricing Officer on verification of material on record including Form no.3CEB report, found that the aforesaid payment was made by the assessee to its AE Orkla A.S. Oslo on account of allocation of costs in respect of Lotus Note. In response to the query raised by the Transfer Pricing Officer, the assessee submitted that the AE procures the user right for Lotus Note and allocates the cost of license and maintenance amongst all users worldwide keeping in view the number of users on quarterly basis. It was submitted, assessee's

share in cost allocation of usage of Lotus Note worked out to ₹ 24,54,556, representing 38 users. The Transfer Pricing Officer was of the view that the payment made by the assessee works out to ₹ 64,594, per user on yearly basis which is exorbitant. Alleging that the assessee was unable to produce any details to demonstrate the working and distribution of cost and further, no evidence was furnished by the assessee to establish that 38 users have received and used the software in India, the Transfer Pricing Officer determined the arm's length price of the services availed at nil. Accordingly, he proposed an adjustment of ₹ 24,54,556.

4. Though, the assessee challenged the aforesaid adjustment before the first appellate authority, however, learned Commissioner (Appeals) upheld the decision of the Transfer Pricing Officer.

5. The learned Authorised Representative submitted, before the Transfer Pricing Officer as well as learned Commissioner (Appeals), the assessee has not only filed detailed submissions but furnished all documentary evidences to demonstrate the mechanism of cost allocation as well as the services rendered to the customers. In this regard he drew our attention to the submissions made before learned Commissioner (Appeals), as reproduced in the appeal order. He also drew our attention to the submissions made before the Transfer

Pricing Officer and the documentary evidences filed before him. The learned Authorised Representative submitted, the modalities of cost allocation were also furnished before the Transfer Pricing Officer and learned Commissioner (Appeals). He submitted, the agreement under which cost is distributed to the group entities has continued in subsequent assessment years also. He submitted, in the subsequent assessment years i.e., A.Y. 2009-10, 2010-11 and 2011-12, the Transfer Pricing Officer has accepted the payment made towards services availed by the assessee on Lotus Note. He submitted, in the preceding years also the amount paid towards cost allocation was allowed. The learned Authorised Representative submitted, when the assessee has received services and benchmarked the international transaction by following one of the approved methods, the Transfer Pricing Officer cannot determine the arm's length price at nil without following any prescribed method and purely on ad-hoc basis. Further, the learned Authorised Representative submitted, though as per agreement the total cost payable to the AE is 4,62,649 Kroner, however, the assessee has actually paid less at 3,23,677 Kroner, which proves that the payment made for the services availed is at arm's length. The learned Authorised Representative submitted, the Transfer Pricing Officer has to determine the arm's length price by following any one of the prescribed methods. He submitted, since the

Transfer Pricing Officer has determined the arm's length price at nil without following any prescribed method, such determination of arm's length price has to be rejected. In this context, he drew our attention to the following decisions of the Hon'ble Jurisdictional High Court: –

- i) CIT v/s Kodak India Pvt. Ltd., ITA no.15/2014, dated 11.07.2016;*
- ii) CIT v/s Johnson & Johnson Ltd., ITA no.1291/2014, dated 03.04.2017;*
- iii) CIT v/s Merck Ltd., ITA no.272/2014, dated 08.08.2016; and*
- iv) CIT v/s Lever India Exports Ltd., [2017] 78 taxmann.com 88.*

6. Further, the learned Authorised Representative submitted, since in the preceding and subsequent assessment years the Department has accepted the benchmarking done by the assessee for payment made to the AE for similar services availed, applying the rule of consistency no disallowance can be made in the impugned assessment year. In support, he relied upon the decision of the Hon'ble Supreme Court in CIT v/s Kargill Foods India Ltd., judgment dated 24th October 2016.

7. The learned Departmental Representative submitted, the details of cost allocation were neither furnished before the Transfer Pricing Officer nor before learned Commissioner (Appeals). He submitted, the assessee also failed to furnish any evidence to establish that services

were received from the AE. Therefore, in the aforesaid circumstances, the Transfer Pricing Officer had no other option but to determine the arm's length price at nil.

8. We have considered rival submissions and perused material on record. As could be seen from the impugned order of learned Commissioner (Appeals) as well as other materials brought on record, not only before the Transfer Pricing Officer but before learned Commissioner (Appeals), the assessee has made elaborate submissions with regard to the services availed and cost allocation relating to Lotus Note and other evidences to justify the payment made to the AE. It is also a fact on record that the assessee has benchmarked the arm's length price of the payment made towards services availed from the AE by applying CUP method. Except making some general observations, the Transfer Pricing Officer has not provided any valid reason why the benchmarking done by the assessee is not acceptable. Further, the Transfer Pricing Officer while determining the arm's length price of the services availed from the AE at nil has apparently not followed any of the methods prescribed under the statute. It is also relevant to observe, the agreement under which the assessee is making payment for availing such services has continued from the preceding assessment years and is also continuing in the subsequent assessment years. It is worth mentioning, in the

subsequent assessment years i.e., A.Y. 2009–10, 2010–11, 2011–12 and 2012–13, the Transfer Pricing Officer has accepted similar benchmarking of arm's length price of the services availed by the assessee from the AE on account of Lotus Note. Therefore, as held by the Hon'ble Supreme Court in Kargill Food India Ltd. (supra), even applying the rule of consistency the benchmarking done by the assessee under CUP method is to be accepted.

9. Even otherwise also, if the Transfer Pricing Officer was not convinced with the benchmarking done by the assessee, he should have benchmarked the arm's length price of the services availed by following any one of the prescribed methods as provided under the statute. A perusal of the order passed by the Transfer Pricing Officer would reveal that while rejecting the benchmarking done by the assessee and determining the arm's length price at nil, he has not followed any prescribed method as provided under the statute. That being the case, the determination of arm's length price at nil by the Transfer Pricing Officer being contrary to the provisions of the Act is not acceptable. This view of ours gets support from the decisions of hon'ble jurisdictional high court (supra) cited by learned Authorised Representative. Moreover, the Transfer Pricing Officer having failed to point out any specific defect or invalidity in bench marking done by the assessee, the price paid by the assessee to the AE for the services

availed has to be held to be at arm's length. In view of the aforesaid, we direct the Assessing Officer to delete the addition of ₹ 24,54,556. Grounds are allowed.

10. In the result, appeal is allowed.

Order pronounced in the open Court on 22.04.2019

Sd/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 22.04.2019

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Sr. Private Secretary)
ITAT, Mumbai