

**IN THE INCOME TAX APPELLATE TRIBUNAL "K", BENCH
MUMBAI**

BEFORE SHRI R.C.SHARMA, AM & SHRI C.N. PRASAD, JM

**ITA No. 6165/Mum/2011
(Assessment Year: 2005-06)**

Audco India Limited, Taxation Department, L&T House, N.M. Marg, Ballard Estate, Mumbai- 400001.	Vs.	Addl.C.I.T., Range-2(1), Aayakar Bhavan, M.K. Marg, Mumbai-400020.
PAN/GIR No. AAACA 9647 E		
(Appellant)	..	(Respondent)

**ITA No. 6989/Mum/2011
(Assessment Year: 2007-08)**

Audco India Limited, Taxation Department, L&T House, N.M. Marg, Ballard Estate, Mumbai- 400001.	Vs.	Addl.C.I.T., Range-2(1), Aayakar Bhavan, M.K. Marg, Mumbai-400020.
PAN/GIR No. AAACA 9647 E		
(Appellant)	..	(Respondent)

**ITA No. 1579/Mum/2013
(Assessment Year: 2008-09)**

Audco India Limited, Taxation Department, L&T House, N.M. Marg, Ballard Estate, Mumbai- 400001.	Vs.	Addl.C.I.T., Range-2(1), Aayakar Bhavan, M.K. Marg, Mumbai-400020.
PAN/GIR No. AAACA 9647 E		
(Appellant)	..	(Respondent)

Assessee by	Shri Rajan R Vora & Shri Hemen Chandariya (ARs)
Revenue by	Shri T. Roumuan Paite (Sr.DR)
Date of Hearing	17/12/2019
Date of Pronouncement	17/12/2019

आदेश / ORDER**PER: R.C. SHARMA, A.M.**

These are the appeals filed by the assessee against the separate orders/directions of the Id. CIT(A)-15/Disputes Resolution Panel-I (DRP), Mumbai dated 29/06/2011, 19/07/2011 and 20/12/2012 for the A.Ys. 2005-06, 2007-08 and 2008-09 respectively in the matter of order passed U/s 143(3)/144C(5) of the Income Tax Act, 1961 (in short, the Act).

2. The grievance of the assessee in all the years are common, therefore, all the appeals were clubbed and heard together and are being decided by this consolidated order.

3. At the outset, the Id AR of the assessee placed on record the order of the Tribunal in assessee's own case for the A.Y. 2004-05 wherein first three issues raised in these appeals have been decided in favour of the assessee.

4. We have considered the rival contentions and carefully gone through the orders of the authorities below. Facts in brief are that the assessee is a 50:50 joint venture between Larsen & Toubro Ltd. India and Audco Ltd. UK and is engaged in the business of manufacturing of industrial valves. The assessee filed its return of income for the A.Y. 2005-06 on 26th October, 2005 declaring total income at INR

49,07,24,600/-. The assessee also filed an accountant's report in Form 3CEB [in accordance with Section 92E of the Act) reporting, inter alia, the particulars of its international transactions with AEs. The A.O. initiated scrutiny assessment proceedings U/s 143(2) of the Act and also referred the case to the TPO. During the assessment proceedings, following transfer pricing adjustments on export of valves to AEs were made:

1. Export of valves of Flowserve Sulphur Springs, USA (Flowserve USA) and Flowserve South Africa (Flowserve SA).
 2. Export of valves to Larsen and Toubro LLC (L&T LLC).
5. The first common grievance in all the three appeals relate to addition made on account of valves to Flowserve USA. Facts in brief are that the assessee has exported certain products to its Associate Enterprises (AE) namely Flowserve USa, Flowserve South Africa and L&T LLC. While passing order U/s 92CA(3) of the Act, the A.O. made adjustment to the transfer price and he has not accepted the loss incurred by the assessee/lower margin earned in the course of export so made. This issue was before the Tribunal in the A.Y. 2004-05 in ITA No. 71/Mum/2011 and the Tribunal vide its order dated 16/12/2015 have observed that the price charged for a transaction between closely related parties (controlled transactions), have to be compared with price

charged for similar transaction between unrelated parties. The Tribunal have further observed as under:

"In our view, assessee's decision to sell products to Flow Serve Sulphur Spring, USA, is a pure business decision which the assessee only can take and the Departmental Authorities cannot step into the shoe of Assessee to question such a decision. If dor the purpose of penetrating the USA market and capacity utilization, the assessee took a decision to sell its product to Flow Serve Sulphur Spring, USA, the same cannot be called into question. Further, the learned counsel for the assessee through chart submitted before us has demonstrated that in the subsequent years, the margin in relation to transactions with Flow Serve, USA, has increased and in fact the assessee has shown profit on such transaction. Similarly, he also demonstrated that the sale to AE in USA has increased the capacity utilization."

6. The Tribunal have further observed that as far as capacity utilization is concerned, assessee could not have sold products to group entities in other countries more than their requirement. It is also a fact that assessee can sell the finished valves and kit forms with specific design, quality, etc. only to group entities. Under these circumstances, assessee's decision to sell finished valves and kit forms to Flowserve Sulphur Springs, USA is understandable.

7. In view of the above discussion, the Tribunal held that no adjustment is required to be made at Arm's Length Price (ALP). This decision of the Tribunal in assessee's own case for the A.Y. 2004-05 has already been upheld by the Hon'ble Jurisdictional High Court vide their

order dated 06/03/2019. The Id Sr.DR has fairly agreed that this issue is covered by the order of the Tribunal in assessee's own case for the A.Y. 2004-05. Respectfully following the order of the Tribunal in assessee's own case for the A.Y. 2004-05, we do not find any justification for the adjustment so made by the A.O. in the A.Y. 2005-06, 2007-08 and 2008-09 respectively.

8. The next ground in the appeal for the A.Y. 2005-06, the assessee has alleged similar addition of Rs. 36,257/- made in respect of export of valves to Flowserve South Africa. Following the same reasoning given hereinabove and respectfully following the order of the Tribunal in assessee's own case for the A.Y. 2004-05, no addition is warranted.

9. The next ground of appeal relates to addition made in A.Y. 2005-06 in respect of export of valves to L&T LLC. This issue is also covered by the decision of the Tribunal for the A.Y. 2002-03. While deciding appeal for the A.Y. 2004-05, the Tribunal have observed that facts of the present case being identical to A.Y. 2002-03, the decision of the Tribunal in the A.Y. 2002-03 will apply. Even otherwise also, in terms with the definition of the word 'transaction' all closely linked transactions have to be aggregated for determining the arm's length price and a selective approach by picking up only a few transactions cannot be adopted.

10. In addition to the order of the Tribunal, the Id AR has relied on following judicial pronouncements:

1. Development Bank of Siingapore (155 TTJ 265)
2. Colour Chem Ltd. (ITA No. 2606/Mum/2011 dated 11 February 2014 (Mumbai ITAT).
3. Adani Wilmer Limited (ITA No. 240 of 2014 dated 7 April 2014 (Guj)
4. Petrochem Middle East India Pvt. Ltd. (ITA No. 2070/Mum/2014 dated 27 April 2016 (Mumbai ITAT).

11. Respectfully following the order of the Tribunal in assessee's own case, we direct the A.O. to work out adjustment in terms of direction given by the Tribunal in assessee's own case for the A.Y.2002-03 and 2004-05. We direct accordingly.

12. The 4th ground in the appeal for the A.Y. 2005-06 ad 2007-08 relates to disallowance U/s 14A of the Act. The A.O. has worked out disallowance U/s 14A of the Act as per Rule 8D of the IT Rules, 1962, we found that as per various rulings of Mumbai ITAT for the years prior to A.Y. 2008-09, it has been held that 5% of the exempt income earned should constitute to be sufficient disallowance for the purpose of Section 14A of the Act. For this purpose, reliance may be placed on the following judicial pronouncements:

1. Vikabh Securities P Ltd. (35 CCH 350)
2. Darashaw & Company P Ltd. (ITA No. 225/Mum/2011)

3. Alok Industries Ltd. (ITA No. 6575/Mum/2010).

13. In view of the above judicial pronouncements, we direct the A.O. to restrict the addition to the extent of 5% of the exempt income in the A.Y. 2005-06 and 2007-08.

14. In the result, all these three appeals of the assessee are allowed in part, in terms indicated hereinabove.

Order pronounced in the open court on 17th December, 2019.

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 17/12/2019
*Ranjan

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

सत्यापित प्रति //True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai