

आयकर अपीलिय अधीकरण, न्यायपीठ – “सि” कोलकाता,  
*IN THE INCOME TAX APPELLATE TRIBUNAL  
KOLKATA BENCH “C” KOLKATA*

Before **Shri S.S.Godara, Judicial Member** and  
**Dr. A.L. Saini, Accountant Member**

**ITA No.627 & 2214/Kol/2017 &  
ITA No.2024/Kol/2018**  
Assessment Years :2012-13 to 2014-15

Sika India Pvt. Ltd. Commercial Complex-II, 620 Diamlond Harbour Road,Kolkta-700 034 <b>[PAN No.AAECS 1119 F]</b>	<b>V/s.</b>	Assistant Commissioner of Income Tax, Circle- 12(2), Aayakar Bhawan, P-7, Chowringhe Square, Kolkta-700 069
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

आवेदक की ओर से/By Assessee	Shri Himanshu Sinha, Advocate
राजस्व की ओर से/By Revenue	Dr. P.K.Srihari, CIT-DR
सुनवाई की तारीख/Date of Hearing	07-11-2019
घोषणा की तारीख/Date of Pronouncement	22-01-2020

**आदेश /O R D E R**

**PER S.S.Godara, Judicial Member:-**

These three appeal(s) for assessment year(s) 2012-13 to 2014-15 arise against the Assistant Commissioner of Income Tax, Circle-12(2) Kolkata's assessment(s) dated 31.01.2017, 18.08.2017 and 27.07.2018 (**assessment year-wise**) in furtherance to the Dispute Resolution Penal-2 “DRP” New Delhi's directions dated 30.11.2016, 13.06.2017 and 31.05.2018; respectively involving proceedings u/s 143(3) r.w.s. 144C of the Income Tax Act, 1961; in short ‘the Act’; respectively.

2. We have heard the parties. Case file(s) perused. Since the instant cases involved identical / inter-connected issue(s), the same are disposed off by our instant common adjudication.

We further proceed assessment year-wise for the sake of convenience and brevity.

**Assessment Year: 2012-13:**

3. The assessee's first and foremost substantive grievance challenges correctness of the lower authorities' action making arm's length price adjustment of ₹69,54,274/- regarding its international transactions involving of import of raw materials from its overseas associates enterprises "**AE**". There is no dispute that the assessee is a group-company of M/s Sika Group founded in Zurich in 1910 carrying business in the field of specialty chemicals. It is a subsidiary of M/s Sika which is engaged in the business of manufacturer and trading of construction chemicals and industrial adhesives.

4. Coming to the admitted facts, we find that the assessee's import of raw material in India involved an amount of ₹202,168,611/- forming the volume of its international transactions. It had further employed cost plus method for benchmarking the said raw material import transactions. It had chosen eight comparable entities alongwith tested party margin of 20.71% as against arms length price in transfer price study @ 9.99%; respectively. Learned counsel *inter alia* submitted that the Transfer Pricing Officer "TPO's order combined the assessee's transactions of import of raw material as well as finished goods under the transactional net method "**TNMM**". He rejected the assessee's cost method accordingly and further excluded its comparables to include fresh ones during reference proceedings.

5. Adverting to the DRP's order / directions dated 30.1.2016, learned counsel submitted that it interest upholds separate benchmark import of raw material and finished goods, affirming the TPO's action employing TNMM and

directed use of segment data to compute profit level indicator “**PLI**” for manufacturing segments. Learned counsel’s case accordingly is that the assessee’s corresponding grounds No.2.-1 to 2.11 raised in the instant appeal seek to exclude seven additional comparables taken by the TPO and inclusion of two more comparables. It is further stated that the lower authorities have erred in computing the proportionate adjustments value as percentage of total purchases instead of total operating cost as well as taking into consideration the manufacturing segment margin of Sika India Pvt. Ltd. by including provision for doubtful debts an operative income in nature. The assessee’s last contention with reference to instant issue is that the lower authorities have further erred in not providing the relevant details of the search process employed for selection of comparable entities.

6. Our attention is also invited to the other relevant particulars entirely the comparable entities M/s Vinati Organics Ltd, Diamines and Chemicals Ltd, Fineotex Chemicals Ltd, Omkar Speciality Ltd, Champion Da-ichi Technologies Ltd, Henkel Teroson India Ltd, Henkel Chembond Surface Technologies Ltd, Polymer Papers Ltd. and Indo Amines Ltd. forming subject-matter of the instant issue. The DRP has itself accepted the Indo Amines Ltd in assessment year 2013-14 and M/s Polymer Paper is a “**PSU**”. Learned counsel quoted product dissimilarities *qua* some of the above stated entities as well. We sought to know about the final outcome of the very issue in preceding or succeeding assessment year(s). We are informed that this tribunal’s co-ordinate bench decision in assessee’s appeal itself **ITA No.911/Kol/2016** for assessment year 2011-12 has restored the issue of selection of comparable entities for afresh adjudication as per law in the very segment back to the TPO for afresh adjudication. We therefore deem it appropriate to follow suit herein as well for the sake of judicial consistency.

7. Mr. Srihari at this stage submitted that the TPO’s consequential proceedings may be directed to take note of the assessee’s special business

segment of the process used in chemical / adhesives industries. Without expressing our opinion comments on merits, we deem it appropriate to observe that the TPO's consequential proceedings shall take note of the assessee's business segment as per law for the purpose of determining arm's length price of its foregoing international transactions. The assessee's instant first grievance is accepted for statistical purposes.

8. Next comes the assessee's second substantive grounds No.3.1 to 3.2 seeking to reverse the lower authorities' action making arm's length price adjustment of ₹37,542/- to its international transactions in the nature of provision for research and development services to the overseas AEs. Learned counsel's only plea during the course of hearing is that assessee is not pressing for these grounds No.3.1 and 3.2 since the third limb of these grievance pleading the impugned ALP computed by the TPO @ 25.31% comes very well within the tolerance margin of  $\pm 5\%$  as per the CBDT's notification No.31/2012 dated 31.01.2012 read with sec. 92C 2<sup>nd</sup> proviso. Our attention is invited to the corresponding computation chart suggesting actual cost, revenue and profits involving figure(s) of ₹707,011/-, ₹8,48,413/- and ₹1,41,402/- followed by 5% addition thereto coming to ₹8,90,834/- and ₹1,83,823/- under the latter two head(s) only; respectively.

9. Learned CIT-DR submitted that the instant second issue necessarily involves appropriate computation of the assessee's tolerance margin as per provision of the Act and therefore, the same be restored to the TPO for finalizing the same as per law. Learned authorized representative is fair in not disputing the Revenue's above stated plea. We therefore accept these for statistical purposes and leave it open to the TPO to finalize consequential computation.

10. The assessee's third substantive grievance seeks to reverse the lower authorities' action making arm's length adjustment of ₹21,31,41,312/-

regarding its international transactions with oversea AEs in the nature of payments for intra group support services. There is no dispute between the parties that the assessee's entire international transactions' value stands adjusted as arm's length price in the lower authorities' order by holding that its services rendered are in the nature of stewardship services and therefore, their arm's length price comes to nil amount only. The TPO also appears to have held that the assessee had failed to provide for any evidence in support of the impugned stewardship services. The DRP has upheld the same in its impugned directions. We notice in this backdrop of facts that this tribunal's co-ordinate bench order in assessee's own case involving **ITA Nos. 575/Kol/2015 & 911/Kol/2016** for assessment years 2010-11 and 2011-12 has settled the issue that the very services in case of the overseas AEs are not stewardship services in nature. Learned co-ordinate bench has also deleted the corresponding adjustments made for the impugned intra-group services as under:-

*"9. Ground Nos. 9 to 14 are against the adjustment relating to payment of service charges under the head Head Quarter Service Agreement and IT Service agreement (hereinafter referred to as "Intra Group Services").*

*9.1 This Bench of the Tribunal in the case of assessee's own case while adjudicating this issue for the Assessment Years 209-10 in ITA No.393/Kol/2014, held as follows:-*

'8. Looking at the nature of the services, we are of the considered opinion that these are not in the nature of stewardship services. These are services which assists Sika India in managing the daily affairs of its business. It helps Sika India in conducting its business operations of manufacturing and sale of chemicals. The DRP, in its order has agreed that the services in question have benefited the assessee company. When this is the factual finding of the DRP, then to come to the conclusion that the ALP was rightly determined at Nil by the Assessing Officer, for the reason that the proportion of the benefit could not be determined separately between the assessee and its AE, is to our mind, not correct. Such difficulties in allocation does not make a service, stewardship service. The assessee has not incurred any expenditure for these services locally. IT has depended entirely on the AE for these services. It is not possible for an organisation such as the assessee to carry on business without these services which include IT Services. They are essential to the business of the assessee.

For the Assessment Year 2006-07, 2007-08 and 2008-09, the TPO has not characterized these services as stewardship services. He sought to determine the ALP of these services based on proportions of share of service fee charged to the Indian entity. In this year, this approach is sought to be changed. Like many other cases, the TPO came to a conclusion that the

services in question are stewardship services, without any basis or logic. Such classification is arbitrary.'

9.2 Consistent with the view taken therein for the Assessment Year 2009-10, on the same issue, we uphold the contentions of the assessee and **delete the addition.**"

11. Learned CIT-DR at this stage submitted that issue as to whether the impugned intra-group services are to be tested action regarding actual rendering of services to be decided. The assessee's case on the other hand is such services are very much a routine affair in case of intra-group entities wherein the lower authorities' have erred in adopting nil value for the purpose of computing arm's length price. We find force in assessee's plea since the lower authorities have been consistently holding the impugned services to be in the nature of stewardship only to this effect stand decided in assessee's favour in all intervening assessment years throughout. We therefore adopt judicial consistencies and decide this issue against the department.

12. Next comes the assessee's additional ground challenging correctness of the lower authorities' action disallowing / adding leave encashment amount of ₹26,69,200/-. Hon'ble apex court's landmark judgment in decision in *National Thermal Power Corporation. Ltd. vs. Commissioner of Income-tax* (1998) 229 ITR 383 (SC) considered in *All Cargo Global Logistics Ltd. vs. DCIT* (2012) 137 ITD 26 (Mum) (SB) holds that this tribunal can very well entertain an additional ground to determine correct tax liability of an assessee provided all the relevant facts form part of records. The department's objections against admissions of assessee's additional ground are rejected.

13. Coming to merits of the leave encashment issue, we find that the assessee had claimed leave encashment on provision basis amounting to ₹10,71,590/-, ₹75,47,996/- and ₹57,54,869/- followed by the disallowance as per final assessment order(s) amounting to ₹107159, ₹75,47,996/- and ₹57,54,869/- in assessment year(s) 2010-11 to 20121-13; respectively. Learned counsel next invited our attention to assessee's corresponding

payments of ₹10,71,590/- and ₹59,97,626/- in the impugned assessment year. We therefore deem it appropriate to restore the instant issue of disallowance of leave encashment back to the Assessing Officer for afresh adjudication / factual verification as per law. The assessee's first appeal **ITA No.627/Kol/2017** is partly allowed in above terms.

14. Next come latter two assessment year(s) 2013-14 & 2014-15 involving assessee's appeals **ITA No.2214/Kol/2017** and **ITA No.2024/Kol/2018**; respectively. Its identical first grievance seeks to reverse lower authorities' action making arm's length price adjustments of ₹45,902,477/- and ₹184,84,469/- on international transactions amounting to ₹10,47,03,741/- and ₹11,79,72,195/-; respectively pertaining to royalty payments. Both the learned representatives are very fair in pointing out that the assessee's stand adopted throughout to have incurred royalty rate expenditure @ 5% and 8% on domestic and export sales is approved by the Reserve Bank of India under automatic root this tribunal's co-ordinate bench's decision(s) in assessment year 2010-11 and 2011-12 (supra) has upheld the same. Learned co-ordinate bench observed that RBI's approved rates constitute a valid benchmark *qua* payment of royalty. We therefore adopt the very reasoning in the impugned assessment order as well to delete the impugned adjustments pertaining of royalties payment.

15. The assessee's second substantive issue in both these assessment year(s) challenges correctness of the lower authorities' action making the intra-group services arm's length price adjustments of ₹184,647,104 and ₹12,26,32,270/- on the ground that the service in question are in the nature of stewardship services only wherein arm's length price has to be taken as nil only. Suffice to say, we reiterate that we have already decided the very issue in its favour and against the Revenue in assessment year 2012-13 (supra). We adopt the very reasoning *mutatis mutandis* to delete the impugned stewardship service adjustments. The assessee succeeds in its identical

second substantive grievance in both these assessment year(s). Its appeal **ITA No.2214/Ko/2017** for assessment year 2013-14 raising these two substantive issues is accepted therefore.

16. Lastly comes the third issue of disallowance of other expenses regarding provision towards rent, re-grouping of existence to rent account, pre-requisite expenses for acquisition, provision towards repair and maintenance, provision towards clearing and forwarding expenses and provision towards sales promotion expenses involving respective figure(s) of ₹3,95,200/-, ₹61,78,956/-, ₹20,11,791/-, ₹26,47,135/-, ₹4,35,827/- and ₹202,85,459/- aggregating to ₹324,54,368/- in assessment year 2014-15. The assessee's only case during the course of hearing is that all these issues except re-grouping of expenses to rent account and pre-acquisition expenses involve double disallowance and the remaining two items included TDS amounts already deducted. Mr. Srihari submitted very fairly that the instant issue primarily involves factual reconciliation at the Assessing Officer's end to avoid double additions. We therefore restore assessee's instant third issue back to the Assessing Officer for necessary factual verification / reconciliation. The same is partly accepted for statistical purposes. Its main appeal ITA No.2024/Kol/2018 is partly allowed in above terms.

17. To sum up, assessee's first and third appeals **ITA No.627/Kol/2017** and **ITA No.2024/Kol/2018** are partly allowed and second appeal ITA No.2214/Kol/2017 is allowed. **A copy of the instant common order be placed in the respective case files.**

Order pronounced in the open court 22/01/2020

Sd/-  
(लेखा सदस्य)  
( A.L.Saini)  
(Accountant Member)  
Kolkata,

Sd/-  
(न्यायिक सदस्य)  
(S.S.Godara)  
(Judicial Member)

\*Dkp

दिनांक:- 22/01/2020 कोलकाता ।

**आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-**

1. आवेदक/Assessee-Sika India Pvt. Ltd., Commercial Complex-II,620 Diamond Harbour Road, Kolkata-700 034
2. राजस्व/Revenue-ACIT,Cir-12(2), Aayakar Bhawan, P-7, Chowringhee Sq. Kolkata-69
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार  
आयकर अपीलीय अधिकरण,  
कोलकाता ।