



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

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI N.K. PRADHAN, ACCOUNTANT MEMBER**

ITA no.4398/Mum./2010  
(Assessment Year : 2005-06)

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

..... Appellant

v/s

Kodak India Pvt. Ltd.  
(Formerly Kodak India Ltd.)  
C/o Kalyaniwalla & Mistry  
Army & Navy Building  
148, Mahatma Gandhi Road  
Fort, Mumbai 400 001  
PAN - AAACK2172J

..... Respondent

C.O. no.65/Mum./2010  
(Arising out of ITA no.4398/Mum./2010)  
(Assessment Year : 2005-06)

Kodak India Pvt. Ltd.  
(Formerly Kodak India Ltd.)  
C/o Kalyaniwalla & Mistry  
Army & Navy Building  
148, Mahatma Gandhi Road  
Fort, Mumbai 400 001  
PAN - AAACK2172J

..... Cross Objector  
(Original Respondent)

v/s

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

..... Respondent  
(Original Appellant)

ITA no.3406/Mum./2010  
(Assessment Year : 2005-06)

Kodak India Pvt. Ltd.  
(Formerly Kodak India Ltd.)  
C/o Kalyaniwalla & Mistry  
Army & Navy Building  
148, Mahatma Gandhi Road  
Fort, Mumbai 400 001  
PAN – AAACK2172J

..... Appellant

v/s

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

..... Respondent

Assessee by : Shri Jitendra Jain  
Revenue by : Shri Suhas Kulkarni

Date of Hearing – 25.11.2019

Date of Order – 21.02.2020

**ORDER**

**PER SAKTIJIT DEY. J.M.**

This bunch consists of a set of cross appeals and a cross objection by the assessee arising out of a common order dated 24<sup>th</sup> March 2010, passed by the learned Commissioner of Income Tax (Appeals)-15, Mumbai, pertaining to the assessment year 2005-06.

**ITA no.3406/Mum./2010**  
**Assessee's Appeal – A.Y. 2005-06**

2. In grounds no.1 to 3, the assessee has challenged the aggregate addition made of 58,26,392, to the opening and closing stock of inventories.

3. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that an amount of ₹ 39,18,000 has been debited towards foreign exchange fluctuation loss in respect of raw materials and finished goods. Noticing this, the Assessing Officer called upon the assessee to file the details of foreign exchange fluctuation gain. After perusing the response filed by the assessee, the Assessing Officer was of the opinion that such loss constitutes cost of purchase. Therefore, following the preceding year's assessment order i.e., A.Y. 2004-05, the Assessing Officer held that the foreign exchange loss of ₹ 6,71,080, is attributable to closing stock, hence, should be added to the value of closing stock. Further, noticing that the assessee had foreign exchange fluctuation gain in the preceding assessment year amounting to ₹ 51,55,312, and the closing stock of the preceding assessment year was reduced to that extent, the Assessing Officer held that the opening stock of the impugned assessment year needs to be reduced by ₹ 51,55,312. Thus, on both the counts he made total addition of ₹ 58,26,392. The aforesaid addition was contested by the assessee before the first appellate authority.

4. Following the order passed by his predecessor-in-office, in the assessment year 1996-97 onwards, learned Commissioner (Appeals) upheld the addition made by the Assessing Officer.

5. The learned Authorised Representative submitted, while deciding assessee's appeal for the preceding years, the Tribunal has consistently held that the assessee is eligible to claim loss on account of foreign exchange fluctuation. To substantiate his claim, the learned Authorised Representative drew our attention to the consolidated order dated 31<sup>st</sup> May 2010, passed by the Tribunal for the assessment years 1996-97, 1997-98, 1998-99 and 2000-01 and 2001-02, the Tribunal's order dated 16<sup>th</sup> July 2010, passed for the assessment year 2003-04 and the Tribunal's order dated 17<sup>th</sup> November 2010, passed for the assessment year 2004-05. Thus, he submitted, the issue stands concluded in favour of the assessee. Further, he submitted, since the closing stock of the preceding assessment year should be opening stock of the current assessment year, suitable adjustment has to be made.

6. The learned Departmental Representative relied upon the observations of the Departmental Authorities.

7. We have considered rival submissions and perused material on record. Following the treatment given by the Assessing Officer to foreign exchange fluctuation loss and gain vis-a-vis the opening and closing stock in the preceding assessment years, the Assessing Officer has made the adjustment to opening and closing stock of the current year. This has resulted in the impugned addition. It is further evident,

merely relying upon the orders passed by his predecessor-in-office in assessee's own case for the assessment year 1996-97 onwards, learned Commissioner (Appeals) has upheld the addition made by the Assessing Officer. Notably, while deciding assessee's appeals for the assessment years 1996-97, 1997-98, 1998-99, 2000-01 and 2001-02, the Tribunal in ITA no.4543/Mum./2001 & Ors., dated 31<sup>st</sup> May 2010, following decision of the Hon'ble Supreme Court in CIT v/s Woodward Governor India Pvt. Ltd., [2009] 312 ITR 254 (SC) held that the value of closing stock is not to include the liability on account of exchange fluctuation. Thus, ultimately, the Tribunal deleted the addition made to the opening and closing stock. Following the aforesaid decision, the Tribunal again decided the issue in favour of the assessee in the assessment year 2003-04, in an appeal being ITA no.6350/Mum./2008, vide order dated 16<sup>th</sup> July 2010, by deleting the addition made on account of adjustment made to the closing stock. The same view was reiterated by the Tribunal over and over again while deciding assessee's appeal in the assessment year 2004-05, in ITA no.1630/Mum./ 2009, dated 17<sup>th</sup> November 2014. Thus, following the consistent view of the Tribunal in the preceding assessment years, as referred to above, the addition made by the Assessing Officer on account of adjustment to the opening and closing stock has to be deleted. Further, the Assessing Officer is directed to verify the value of closing stock as determined in the assessment year 2004-05 add the

amount of ₹ 51,55,312, to the opening stock of inventories. These grounds are allowed.

8. In grounds no.4, 5 and 6, the assessee has challenged the disallowance of ₹ 5,00,000, under section 14A r/w rule 8D.

9. Brief facts are, during the assessment proceedings, the Assessing Officer noticed that the assessee in the year under consideration, has earned exempt income of ₹ 46,20,800, called upon the assessee to explain as to why disallowance under section 14A of the Act should not be made. Though, the assessee objected to the proposed disallowance, however, rejecting the objections of the assessee, the Assessing Officer proceeded to compute the disallowance applying the provision of rule 8D and ultimately worked out the disallowance at ₹ 32,14,000. The assessee contested the aforesaid disallowance before the first appellate authority.

10. The learned Commissioner (Appeals), after considering the submissions of the assessee, upheld the applicability of rule 8D. However, considering the fact that in an order passed under section 154 of the Act, the Assessing Officer has restricted the disallowance under section 14A of the Act to ₹ 5,00,000, treated the ground raised by the assessee as infructuous.

11. The learned Authorised Representative submitted, the provisions of rule 8D are not applicable prior to the assessment year 2008–09. Therefore, the disallowance computed by the Assessing Officer by applying the provisions of rule 8D is unsustainable. Without prejudice, he submitted, the disallowance under section 14A may be restricted to 2% of the dividend income earned during the year.

12. The learned Departmental Representative relied upon the observations of the Assessing Officer and learned Commissioner (Appeals).

13. We have considered rival submissions and perused the material on record. Now it is fairly well settled that rule 8D is applicable from the assessment year 2008–09. Therefore, the Assessing Officer has completely gone wrong in computing the disallowance under section 14A of the Act by applying rule 8D. Considering the relevant facts, we are of the view that disallowance under section 14A of the Act in the impugned assessment year should be restricted to 5% of the dividend income earned during the year. These grounds are partly allowed.

14. In grounds no.7 and 8, the assessee has challenged the addition made of ₹ 43,64,399, on account of reimbursement of cost incurred on behalf of the Associated Enterprises (AEs).

15. Brief facts are, the Transfer Pricing Officer, in the course of proceedings before him, noticed that the AEs have reimbursed the assessee the actual expenditure incurred on their behalf. Thus, he called upon the assessee to furnish the details of recovery of expenditure along with invoices. As alleged by the Transfer Pricing Officer, vide letter dated 16<sup>th</sup> September 2008 the assessee simply submitted that the expenditure represents third party cost incurred on behalf of the AEs, hence, were reimbursed at cost. However, the assessee expressed its inability to furnish any supporting evidence on the plea that such evidences are in possession of third party service provider. Thus, in the absence of any evidence furnished by the assessee, the Transfer Pricing Officer came to a conclusion that an independent enterprise would have charged a mark-up on any amount of support service provided to an unrelated enterprise. Further, stating that companies engaged in providing support service generally earn a cost plus mark-up of 10% to 15% with an average of 12.5%, he proceeded to determine the arm's length price of the provisions of service to the AEs by applying the rate of 12.5% on the cost incurred and made an adjustment of ₹ 43,64,399. The aforesaid amount was added back to the income of the assessee. Though, the aforesaid addition was contested before learned Commissioner (Appeals), however, observing that the assessee failed to furnish any supporting

evidence, learned Commissioner (Appeals) sustained the addition made on account of transfer pricing adjustment.

16. The learned Authorised Representative submitted, the assessee has no written agreement with the AEs towards cost reimbursement. However, the cost was reimbursed on the basis of Debit Notes. He submitted, the assessee had engaged two agencies for storing the documents. These documents were stored with one of the agencies, hence, were not immediately available. He submitted, now the assessee has been able to obtain the Debit Notes and some other evidences which the learned Authorised Representative wanted to furnish as additional evidences. The learned Authorised Representative submitted, these evidences may be admitted and issue may be restored back to the Assessing Officer for fresh adjudication. Further, he submitted, there is also a mistake in the figure of actual reimbursement which, if considered, would not result in any transfer pricing adjustment.

17. The learned Departmental Representative opposing the admission of additional evidences submitted, these evidences were not filed either at the stage of assessment proceedings or even before learned Commissioner (Appeals). Therefore, he submitted, the addition should be sustained.

18. We have considered the rival submissions and perused the material on record. Undisputedly, both the Assessing Officer and learned Commissioner (Appeals) have recorded a concurrent finding of the fact that the assessee has failed to furnish any supporting evidence to demonstrate that the reimbursement made by the AEs was at arm's length price. Therefore, the Transfer Pricing Officer has added a mark-up of 12.5% on estimate basis to the cost incurred for determining the arm's length price of the service provided. Before us, the assessee has furnished certain additional evidences by way of Debit Notes to demonstrate that the reimbursement was on the basis of actual cost incurred without any mark-up. In our considered opinion, the additional evidences furnished by the assessee will have a crucial bearing in deciding the arm's length nature of transaction with the AEs. Therefore, we are inclined to admit the additional evidences furnished by the assessee. However, since these evidences were not furnished either before the Assessing Officer or before learned Commissioner (Appeals), to provide a fair opportunity to the Revenue to evaluate the evidences and take a decision on the matter, we are inclined to restore the issue to the Assessing Officer for fresh adjudication after due opportunity of being heard to the assessee. These grounds are allowed for statistical purpose.

19. In view of our decision in grounds no.7 and 8, ground no.9, which is a without prejudice issue raised by the assessee, is also restored back to the Assessing Officer for fresh adjudication if warranted. These grounds are allowed for statistical purposes.

20. In the result, assessee's appeal is partly allowed.

**ITA no.4398/Mum./2010**  
**Revenue's Appeal - A.Y. 2005-06**

**C.O. no.65/Mum./2011**  
**By Assessee**

21. We propose to take the aforesaid appeal by the Revenue and the cross objection by the assessee together, as the issues are overlapping. While the issue in Revenue's appeal is relating to selection of certain comparables, the issue raised in the cross objection also relates to inclusion of certain comparables. However, in an additional ground raised in the cross objection, the assessee has also raised the issue of adjustment made by the Transfer Pricing Officer at entity level instead of restricting it to the AE transactions.

22. The learned Authorised Representative submitted, while making adjustment to the international transaction in the manufacturing segment, the Transfer Pricing Officer has made adjustment at entity level by considering the entire turnover of the manufacturing segment. He submitted, since the duty of the Transfer Pricing Officer is to

determine the arm's length price of the international transaction with the AE, he should have restricted the adjustment only to the AE segment alone and not at the entity level. The learned Authorised Representative submitted, while deciding identical issue in assessee's own case for the assessment year 2004-05, the Tribunal in ITA no.1630/Mum./2009 & Another, dated 17<sup>th</sup> November 2014, not only admitted the additional ground raised by the assessee, but also restored the issue back to the Assessing Officer/Transfer Pricing Officer for verifying assessee's claim. He submitted, in pursuance to the directions of the Tribunal, the Transfer Pricing Officer has passed an order on 31<sup>st</sup> August 2016, accepting assessee's claim of making the adjustment only to the AE transactions and while doing so he has found that, the margin of the assessee falls within  $\pm 5\%$  of the arm's length price. Accordingly, no adjustment was made. Further, in this respect, he relied upon the following decisions:-

- i) *CIT v/s Tara Jewels Exports Pvt. Ltd., ITA no.1814/2013, dated 05.10.2015;*
- ii) *CIT v/s Ratilal Becharlal & Sons, [2016] 65 taxmann.com 155 (Bom.);*
- iii) *CIT v/s Thyssen Krupp Industries India Pvt. Ltd., ITA no.2201/2013, dated 02.12.2015; and*
- iv) *Thyssen Krupp Industries India Pvt. Ltd. v/s ACIT, [2017] 27 taxmann.com 334 (Mum.).*

23. Thus, he submitted, the matter may be restored back to the Assessing Officer/Transfer Pricing Officer for computing the arm's length price by considering the transactions with the AE only.

24. The learned Departmental Representative submitted, since the aforesaid issue has been raised for the first time through additional grounds, it requires verification by the Assessing Officer/Transfer Pricing Officer.

25. We have considered rival submissions and perused the material on record. At the outset, we must observe that the issue raised by the assessee in the additional grounds of the cross objection is a purely legal issue and can be decided on the basis of facts already available on record. Therefore, we are inclined to admit the additional ground. It is the contention of the learned Authorised Representative before us that any adjustment to the arm's length price of the international transaction with the AE has to be made qua the international transaction and cannot be made at the entity level. We, in principle, agree with the aforesaid submissions of the learned Authorised Representative. It is the contention of the learned Authorised Representative that if the arm's length price is computed purely on the basis of transaction with the AE, the margin will fall within  $\pm 5\%$  of the margin of the comparables requiring no further adjustment. Therefore, the issues raised regarding acceptability or otherwise of certain

comparables may not have to be decided in the impugned assessment year. Keeping in view the aforesaid submissions of the assessee, we restore the issue back to the file of the Assessing Officer for computing the margin of the assessee by taking into consideration only the transaction with the AE and not at entity level. In case, it is found that assessee's margin falls within  $\pm 5\%$  of the margin of the rest of the selected comparables, there may not be any need for adjudicating the dispute relating to the comparables in the impugned assessment year. However, the issues relating to the comparables are kept open for adjudication if they arise in any other assessment year in future. Additional ground is allowed for statistical purposes and rest of the grounds raised in Revenue's appeal as well as in assessee's cross objecting having become infructuous are dismissed.

26. In the result, assessee's appeal being ITA no.3406/Mum./2010 is partly allowed, Revenue's appeal being ITA no.4398/Mum./2010 is dismissed and assessee's cross objection no.65/Mum./2010, is partly allowed.

Order pronounced in the open Court on 21.02.2020

**Sd/-**  
**N.K. PRADHAN**  
**ACCOUNTANT MEMBER**

**Sd/-**  
**SAKTIJIT DEY**  
**JUDICIAL MEMBER**

**MUMBAI, DATED: 21.02.2020**

*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

Assistant Registrar  
ITAT, Mumbai