

आयकर अपीलीय अधिकरण
मुंबई पीठ "के"
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI
श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष एवं
श्री नबीन कुमार प्रधान, लेखा सदस्य के समक्ष
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI N.K.PRADHAN, ACCOUNTANT MEMBER.
आअसं. 2163/मुं/2017 (नि.व.2012-13)
ITA NO. 2163/MUM/2017 (A.Y.2012-13)

Henkel Chembond Surface Technologies Ltd.
(Now Known as Henkel Surface
Technologies Pvt.Ltd.)
B-23, Todi Industrial Estate, 2nd Floor,
Sun Mill Compound, Lower Parel,
Mumbai 400 013.
PAN:AAACH7282G

: अपीलार्थी/ **Appellant**

बनाम/ Vs.

Additional Commissioner of Income Tax,
Circle 7(1)(2), Room No.130, 1st Floor,
Aaykar Bhavan, M.K.Road,
Mumbai 400 020.

: प्रत्यर्थी/ **Respondent**

Assessee by : S.Shri Madhur Agrawal/Dhiren
Revenue by : S.Shri Sushil Kr. Mishra/Sunil
Deshpande
सुनवाई की तारीख/
Date of Hearing : 21/01/2021
घोषणा की तारीख /
Date of Pronouncement : 03/02/2021

आदेश/ ORDER

This appeal by the assessee is directed against the assessment order dated 30/01/2017 passed under section 143(3) r.w. section 144C(13) of the Income Tax Act, 1961 (in short 'the Act') for the assessment year 2012-13.

2. Shri Madhur Agrawal, appearing on behalf of the assessee submitted that the solitary issue raised by the assessee in present appeal is against the Transfer Pricing adjustment in respect of Regional Management Charges. The Id. Authorized Representative for the assessee submitted that the assessee is a joint venture between Henkel KGaA Germany(51% equity) and Chembond Chemicals Ltd, India(49% equity). During the period relevant to assessment year under appeal, the assessee paid Rs.2,24,50,358/- towards Regional Management Charges to its Associated Enterprises(in short 'AE'). The assessee furnished necessary documents before the Transfer Pricing Officer to substantiate the services provided by the AE. However, the TPO without properly appreciating the documentary evidence concluded that the assessee has failed to provide documents in support of various services availed and determined the Arm's Length Price (ALP) of Regional Management Services at nil, thereby making adjustment of Rs.2,24,50,358/-. The assessee filed objection before the DRP against the adjustment made by TPO. The DRP vide directions dated 01/12/2016 rejected objections raised by the assessee against determination of Nil ALP in respect of Regional Management Services. While deciding the issue against the assessee, the DRP category observed that in the previous year also, the assessee has failed to establish that services were rendered and it has also failed to establish the actual benefits from the services and the market value of such services, if any. The DRP for rejected the contentions of the assessee in the impugned year relied on the decision of DRP in assessee's case for assessment year 2011-12.

3. The Id. Authorized Representative for the assessee submitted that the assessee in assessment year 2011-12 carried the issue in appeal before the Tribunal in ITA No.1049/Mum/2016. The Tribunal vide order dated 09/12/2020 deleted adjustment and decided the issue in favour of the assessee. The Id. Authorized Representative for the assessee further pointed that similar adjustment on account

of Regional Management Charges was made in the assessment year 2013-14. The assessee carried the issue in appeal before the Tribunal in ITA No.6999/Mum/2017. The Tribunal following its earlier order in ITA No.1049/Mum/2016 (supra) decided the issue in favour of assessee.

4. On the other hand, Shri Sushil Kr. Mishra, representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee. The Id. Departmental Representative submitted that the assessee has failed to establish services rendered by the AE and benefits derived by the assessee from such services.

5. We have heard submissions made by rival sides and have examined the orders of authorities below. The assessee in appeal has raised six grounds. All the grounds are directed towards single issue of T.P adjustment in respect of Regional Management Charges. We find that identical issue had come up before the Co-ordinate Bench in assessee's own case for assessment year 2011-12. The contention of the assessee is that the nature of services rendered by the AE in impugned assessment year and in assessment year 2011-12 are identical. This submission of the assessee also find support from the observations of the DRP in para 2.3 and para 2.3.2 of the directions dated 01/12/2016. The same are reproduced herein below for ready reference:

"2.3 We have considered the submission made by the assessee, the findings of the TPO and the material on record. We find that the issue is covered by the decision of the DRP in the case of assessee for A.Y 2011-12.

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2.3.2 In the previous year under consideration and also, the assessee has failed to establish that services, if any, rendered were requested for and the services were in the nature of chargeable services. It has also failed to establish the actual benefits from the services and the market value of such services, if any. It has further failed to demonstrate the incurrence of cost by the AE as well as its allocation among the various

group entities. In view of the reasons given in the order for A.Y.2011-12 in the case of the assessee, quoted above, the action of the TPO in determining ALP of Regional Management Services at Rs.nil is upheld.”

6. In assessment year 2011-12, the assessee carried the issue in appeal before the Tribunal in ITA No.1049/Mum/2016 (Supra). The Co-ordinate Bench after considering the facts and various judgments deleted the adjustment. The relevant extract of the finding of the Tribunal are reproduced herein below:-

“9. We shall first deal with the assessee’s claim that supporting documentary evidence clearly establishing rendering of regional management services by the AE was duly placed on record in the course of the proceedings before the lower authorities, viz. (i) copy of regional management services “agreement”, dated 23.11.2010 executed between the assessee and its AE i.e Henkel AG & Company KGaA; (ii) details of regional management charges; and (iii). copies of “debit notes” raised on the assessee by its AE towards regional management charges. Apart from that, we find that the assessee vide its letter dated 31.12.2014 had submitted with the lower authorities the statement of “Cost Benefit Analysis” of Regional Management Cost for the year under consideration along with details viz. (i) requirement to avail the regional management services; (ii) description of services received from the AE; (iii) information in relation to the visits by the overseas employees for rendering the services; and (iv) back up documentation substantiating the benefits received by the assessee in lieu of the services provided by its AE. On a perusal of the “Regional Management Agreement”, dated 23.11.2010 executed between the assessee and its AE, viz. Henkel AG & Company KGaA, we find, that the details of various services received by the assessee company are therein duly specified. It has been the claim of the assessee before the lower authorities that the regional management services provided by its AE, viz. Henkel AG & Company KGaA had assisted it in its decision making and adoption of the best policies and practices which had therein resulted in a better market position and ultimate increase in its sales. As observed by us hereinabove, the A.O/TPO had determined the ALP of the regional management services received by the assessee from its AE at Rs.nil, for the reason, that no material was placed on record by the assessee which would evidence availing of any such services by the assessee from its AE. We have perused the material available on record and are afraid that the aforesaid observation of the lower authorities do not find favour with us. On a perusal of the “Regional Services Agreement”, dated 23.11.2010 executed between the assessee and its AE, viz. Henkel AG & Company, KGaA, we find that the complete details of the regional management services to be rendered by the AE to the assessee are therein clearly described at length. Further, the assessee had in the course of the proceedings before the lower authorities placed on record the copies of the “debit notes” which were raised on it by its AE viz. Henkel AG & Company, KGaA for rendering of the aforesaid services. Also, copies of the various e-mail correspondences between the assessee and its aforesaid AE supporting the factum of rendering of regional management services by the AE to the assessee company were filed in the course of the proceedings before the lower authorities. In fact, the assessee had also placed on record

the complete details of the payments made by the assessee to its AE for provision of regional management services. Cost benefit analysis of regional management cost (RMC) pertaining to a range of regional services rendered by the AE within the group, viz.(i) regional planning and guiding services; (ii) regional marketing services; (iii) regional supply and chain operational support services; and (iv) regional safety, health and environment support compliance services, therein explaining the benefits derived by the assessee from the services rendered by the AE were also filed by the assessee before the lower authorities in order to drive home its claim of having received the aforesaid services along with benefit derived therefrom. In the backdrop of the aforesaid documentary evidence, we are unable to comprehend as to how the AO/TPO had concluded that the assessee had failed to furnish the requisite documentary evidence which would substantiate rendering of regional management services by the AE, viz. Henkel AG & Company, KGaA to the assessee during the year under consideration. In our considered view, the material placed on record by the assessee does constitute substantial evidence which clearly establishes that the assessee had received regional management services from its AE, viz. Henkel AG & Company, KGaA. We find that the assessee had entered into the regional management service "agreement" with its AE, viz. Henkel AG & Company, KGaA primarily to benefit from the services provided by the latter on the basis of its experienced personnel who were possessed of rich experience in understanding the practical aspects of the nature of business of the assessee along with its service requirement. Fact that the services received by the assessee from its AE had vastly benefitted it can also safely be gathered from the cost benefit analysis of RMC as was submitted by the assessee with the AO/TPO. In the backdrop of our aforesaid, deliberations, we are, unable to, concur with the observations of the lower authorities that the assessee had failed to place on record documentary evidence which would substantiate the rendering of regional management services by its AE, viz. Henkel AG & Company, KGaA to the assessee company. We are persuaded to subscribe to the claim of the Id. A.R that as the regional management services received by the assessee from its AE are intangible in nature, therefore, evidence in support of availing of such services and the benefit received therefrom can only be demonstrated by narrations, descriptions and documentary evidence..... On the basis of our aforesaid observations, we are of a strong conviction that the material placed on record by the assessee to substantiate its claim of having received regional management services from its AE, viz. Henkel AG & Company, KGaA therein clearly establishes the same. We thus are unable to persuade ourselves to subscribe to the view taken by the AO/TPO that the assessee had failed to substantiate its claim of having received regional management services from its AE during the year under consideration.

10. Apart from our aforesaid observations wherein it stands clearly established that the assessee had received regional management services from its AE, viz. Henkel AG & Company, KGaA, we are even otherwise unable to concur to the determining of the ALP of the regional management services received by the assessee from its AE, viz. Henkel AG & Company, KGaA by the TPO at Rs. Nil i.e without following any one of the prescribed methods contemplated in Sec.92C(1) of the Act, as against that determined by the assessee at Rs. Rs.2,61,63,288/- by adopting TNMM as the most appropriate method. In fact, our aforesaid view that the TPO is divested of his jurisdiction in benchmarking the international transactions of an assessee at nil or in an ad hoc manner without following

any one of the prescribed methods is fortified by the judgments of the Hon'ble High Court of Bombay viz. (i) CIT Vs. Merck Limited. (ITA No. 272 of 2014), dated 08.08.2016; (ii) CIT Vs. Lever India Exports Limited (ITA No.1306, 1307 and 1349 of 2014), dated 23.01.2017; (iii) CIT Vs. Johnson & Johnson Ltd. (ITA No.1030 of 2014), dated 07.03.2017; and (iv) CIT vs. Kodak India Pvt. Ltd.(ITA No.15 of 2014), dated 11.07.2016. As observed by the Hon'ble High Court of Bombay in the aforementioned cases, the TPO is not permitted to determine the ALP of the International transactions without following any one of the methods prescribed under Sec. 92C(1) of the Act. Accordingly, in the backdrop of our aforesaid observations we are unable to sustain the determination of the ALP of the regional management services received by the assessee from its AE, viz. Henkel AG & ITA No.1049/Mum/2016 A.Y. 2011-12 Henkel Chembond Surface Technology Ltd. Vs. ACIT,Circle 7(1)(2) 14 Company, KGaA, at Rs. nil by the TPO without resorting to any transfer pricing exercise as per any of the method prescribed in Sec.92C(1) of the Act, as against that determined by the assessee at Rs. 2,61,63,288/- by adopting TNMM as the most appropriate method. We thus in terms of our aforesaid deliberations vacate the addition towards TP adjustment of Rs.2,61,63,288/- made by the AO/TPO. The Grounds of appeal No. 1 to 8 are allowed in terms of our aforesaid observations."

[Emphasis by us]

In the impugned assessment year we find that the assessee has filed similar evidences as were filed in assessment year 2010-11. To amplify the services rendered the assessee has filed copies of debit notes supporting Regional Management Charges, cost benefit analysis of Regional Management Charges, reasons for availing intra group services, nature of services availed, basis of charges, etc. The Id. Departmental Representative has not disputed that the nature of expenditure in respect of Regional Management Charges in the impugned assessment year is in any manner different from that in the preceding assessment year.

7. We further observe that in subsequent assessment year i.e. assessment year 2013-14, as well, the TPO had made similar transfer pricing adjustment in respect of Regional Management Charges. The assessee carried the issue in appeal before the Tribunal in ITA No.6999/Mum/2017. The Tribunal vide order dated 11/01/2021 following its own order in ITA No.1049/Mum/2016(supra) deleted the addition in respect of Regional Management Services.

8. Considering the fact that in the impugned assessment year the services were rendered by AE in pursuance to the same Regional Services Agreement dated 23/11/2010 and there has been no change in the nature of services rendered by AE and method of remuneration, we see no reason to take a different view. Therefore, in the facts of the case and the decisions of Co-ordinate Bench in assessee's own case for assessment year 2011-12 and assessment year 2013-14, the transfer pricing adjustment on account of Regional Management Charges paid to foreign A.E is deleted for parity of reasons.

9. In the result, appeal by the assessee is allowed.

Order pronounced in the open Court on Wednesday, the 3rd day of February, 2021.

Sd/-

(N.K.PRADHAN)

लेखा सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 03/02/2021

Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषित **Copy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT,
Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai