

आयकर अपीलीय अधिकरण
मुंबई पीठ "के "
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एम. बालगणेश, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

आअसं. 222/मुं/2019 (नि. व. 2011-12)
ITA NO.222/MUM/2019(A.Y.2011-12)
आअसं. 223/मुं/2019 (नि. व. 2012-13)
ITA NO.223/MUM/2019(A.Y.2012-13)

Advance Power Display System Ltd.
Unit No.6, Multistoried Building,
SEEPZ-SEZ, Andheri (East)
Mumbai – 400 096
PAN: AAACA-5970-G

..... अपीलार्थी /Appellant

बनाम Vs.
The JCIT (OSD),
Mumbai .

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Y.P. Trivedi Sr. Advocate with
Shri Nishit Gandhi
प्रतिवादी द्वारा/Respondent by : Shri Sathya Pinisetty
सुनवाई की तिथि/ Date of hearing : 08/02/2022
घोषणा की तिथि/ Date of pronouncement : 05/05/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

These two appeals by the assessee are directed against the order of Commissioner of Income Tax(Appeals)-55, Mumbai [in short 'the CIT(A) '] for the assessment years 2011-12 and 2012-13, respectively. Both the impugned order are of even date i.e. 15/11/2018. Since, identical issues are involved in

both these appeals, these appeals are taken up together for adjudication and are decided by this composite order.

2. For the sake of convenience, the facts are narrated from appeal in ITA No.222/Mum/2019 for Assessment Year 2011-12.

ITA NO.222/MUM/2019-A.Y.2011-12:

2.1 Shri Y.P. Trivedi appearing on behalf of the assessee submitted that assessee is engaged in manufacturing of Switch Mode Power Supplies used in Computer Industry and Information Technology applications. The assessee is a subsidiary of M/s. Dynamic Systems Ltd., USA and is a 100% export oriented unit. During period relevant to the assessment year under appeal, the assessee purchased raw material from its Associated Enterprise(AE) in Singapore. The AE was remunerated at cost +3% mark up. The assessee benchmarked the transaction of import of raw material by applying CUP. The Transfer Pricing Officer (TPO) objected to 3% mark up on cost price and held that only cost price should have been charged by the AE. Thus, the TPO made adjustment of Rs.3,00,97,259/-. The Id. Counsel for the assessee submitted that the TPO without appreciating the fact that the 3% mark up on the cost price fair and justified as the net margin of the assessee is higher than the average margin of the comparables. The Id. Counsel referred to TP Report, where the assessee has selected the comparables and has determined the average margin of comparables at 3.3% as against average margin of the assessee at 4.92%. He submitted that the assessee filed rectification petition before the TPO pointing that where variation between Arms Length Price(ALP) and the price at which international transaction has actually been undertaken

does not exceed 5%, the price at which international transaction has actually been undertaken shall be deemed to be ALP. The TPO dismissed the rectification petition of the assessee vide order dated 30/01/2017 holding that in the present case most appropriate method has not been specified, accordingly the benefit of provisions of section 92C(2) of the Income Tax Act, 1961 [in short 'the Act'] would not be available. The Id. Counsel for the assessee asserted that the TPO has not pointed any defect in the TP study before disturbing benchmarking of the transaction by the assessee. The TPO has not specified as to which method as specified u/s.92C(1) of the Act has been adopted as most appropriate method for making the adjustment. The Id. Counsel for the assessee contended that Hon'ble Bombay High Court in the case of CIT vs. Johnson & Johnson, 247 Taxman 36 has held that where TPO has not followed the prescribed method u/s. 92C to benchmark international transaction and the adjustment is made solely on the basis of assumption, the TP adjustment is not sustainable.

2.2 The Id. Counsel for the assessee submitted that another issue with regard to TP adjustment is with respect to depreciation on fixed assets. He submitted that Chapter-X does not apply to fixed assets, therefore, no adjustment could not have been made in respect of depreciation.

2.3 The Id. Counsel for the assessee submitted that in ground No.3 of appeal, the assessee has assailed findings of the CIT(A) in disallowing payment of gratuity u/s. 43B of the Act. He submitted that gratuity was paid before the due date of filing of return of income. Hence, the same should be allowed to the assessee.

2.4 The Id. Counsel for the assessee contended that ground No.4 of appeal is with regard to disallowance of Rs.48,298/- on account of bogus purchases allegedly made from hawala parties. The Assessing Officer made 100% addition of the alleged bogus purchases, despite the fact that they were duly accounted.

2.5 The Id. Counsel for the assessee stated at Bar that he is not pressing additional ground raised in the appeal.

3. On the other hand, Shri Sathya Pinisetty representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee. The Id. Departmental Representative submitted that assessee has failed to substantiate as to how mark up of 3% is justified. No documents have been furnished by the assessee in support of its contentions, hence, the TPO has rightly disallowed 3% mark up on costs for import of raw material.

4. We have heard the submissions made by rival sides and have examined the orders of authorities below. The ground No.1 of appeal is general and hence, require no specific adjudication. In ground No.2 of appeal, the assessee has assailed TP adjustment of Rs.3,31,98,947/-.

4.1 The first component of TP adjustment is with respect to ALP of import of raw material. The assessee has purchased raw material from its AE at Singapore. The assessee has applied CUP to benchmark its transaction. The assessee remunerated its AE with cost +3% markup. The sole objection of the TPO is that 3% markup is unjustified. The cost price should be the ALP. We

find that while coming to the conclusion that cost price should be ALP, the TPO has not applied any method specified u/s 92C of the Act. The assessee has pointed that even after charging 3% markup average margin of the assessee (4.92%) is more than the average margin of the comparables (3.30%). A perusal of the order passed by TPO reveals that the TPO has neither disputed the comparables selected by the assessee nor the most appropriate method adopted by the assessee to benchmark its transaction. The TPO in a cursory manner has raised objection on 3% markup charged by the AE on the cost price. No method to benchmark the transactions as specified in Rule 10A and 10B has been applied by the TPO for making the adjustment. This fact is also evident from the observations made by the TPO while disposing of rectification application of the assessee filed u/s. 154 of the Act. The Hon'ble Jurisdictional High Court in the case of CIT vs. Johnson & Johnson (supra) has held that TPO is obliged under the law to determine ALP by following one of the prescribed methods detailed in section 92C(1) of the Act. In the instant case, the findings of TPO that the payment made is excessive are solely based on surmises and conjectures. Hence, the same are unsustainable. We find merit in the submissions of the assessee, consequently, ground No.2.2(a) of the appeal is allowed.

5. The second component of TP adjustment is depreciation on fixed asset. The Counsel for the assessee submitted that the assessee had imported fixed assets on costs + markup of 8%. The TPO determined the ALP on fixed assets at costs and made adjustment of the markup of 8%. The assessee carried the issue in appeal before the CIT(A). The CIT(A) in principle agreed that fixed assets are part of capital account and hence, no adjustment could have been made, however, the CIT(A) directed the Assessing Officer not to grant

depreciation on the adjustment made on the cost of fixed assets. We do not concur with the findings of CIT(A) in not allowing depreciation on the markup cost. Once it is held that no -adjustments can be made on fixed assets, which are part of capital account, the depreciation is to be allowed on the cost at which fixed assets have been acquired. The Assessing Officer is directed to allow the benefit of depreciation on the entire cost of fixed assets. Hence, ground No.2.2(b) of the appeal is allowed.

5.1 The other grounds raised in ground No.2 are either in support of the grounds that have already been adjudicated or are alternate submissions. Since, the primary issue with respect to TP adjustment has been decided in favour of the assessee, the remaining sub-grounds have become academic and hence, not taken up for adjudication. In the result, ground No.2 of the appeal is partly allowed.

6. In ground No.3 of appeal, the assessee has assailed disallowance of gratuity payment. Undisputedly, the payment has been made after due date as specified under the relevant Act, but before the due date of filing return of income. Therefore, in light of the decision rendered by Hon'ble Jurisdictional High Court in the case of Ghatge Patil Transport Ltd., 368 ITR 749, the expenditure is allowable towards gratuity payment. Consequently, ground No.3 of appeal is allowed.

7. In ground No.4 of appeal, the assessee has assailed disallowance of bogus purchases amounting to Rs.48,295/-. Undisputedly, the assessee failed to discharge its onus in proving genuineness of the purchases from parties declared as hawala operators by Sales Tax Department, Government of

Maharashtra. The Hon'ble Bombay High Court in the case of PCIT vs. Paramshakhti Distributors Pvt. Ltd. in Income Tax Appeal No.413 of 2017 decided on 15/07/2019 has held that only profit element embedded in such transaction should be brought to tax. The Assessing Officer made addition of the entire alleged bogus purchases. In first appellate proceedings the CIT(A) upheld the same. Taking into consideration entirety of facts, we deem it appropriate to restrict the disallowance in respect of bogus purchases to 12.5% of unproved purchases. The ground No.4 of the appeal is thus, partly allowed.

8. The Counsel for the assessee stated at Bar that he is not pressing additional ground of appeal. Consequently, the same is dismissed as not pressed.

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

ITA NO.223/MUM/2019 –A.Y 2012-13.

10. Both sides are unanimous in stating that TP issue in assessment year 2012-13 is identical to the issue raised in assessment year 2011-12. The Id. Counsel for the assessee contended that the submissions made in respect of TP issue in assessment year 2011-12 would equally apply to assessment year 2012-13.

11. After hearing both the sides and the order of the authorities below we find that TPO has made TP adjustment in the impugned assessment year for the similar reasons as was made in assessment year 2011-12. Since, the facts are pari-materia, our findings on Transfer Pricing adjustment for assessment

year 2011-12 would *mutatis mutandis* apply to the assessment year 2012-13, as well.

12. The ground No.3 and 4 of the appeal is with regard to disallowance of foreign tour expenses Rs.63,760/-. We find that the assessee has claimed foreign travelling expenses to the tune of Rs.48,92,642/-. The assessee was asked to furnish break-up of the travelling expenses on foreign travel. From the break-up furnished by the assessee, the Assessing Officer concluded that Rs.63,760/- were in respect of visit to Hong Kong by the Directors. The Assessing Officer concluded that the visit to Hong Kong by the directors was on personal account and unconnected to the business. Hence, the Assessing Officer disallowed foreign travel expenditure of Rs.63,760/-. The CIT(A) upheld the findings of the Assessing Officer. No material was placed before us to controvert the findings of authorities below, we find no merit in ground No.3 & 4 of the appeal, hence dismissed.

13. In the result, appeal of the assessee is partly allowed.

14. To sum up, appeal by assessee for assessment year 2011-12 and 2012-13 are partly allowed.

Order pronounced in the open court on Thursday the 05th day of May, 2022.

Sd/-

(M. BALAGANESH)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 05/05/2022

Vm, Sr. PS(O/S)

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषितCopy 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.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai