

IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No.1274/Mum./2016

(Assessment Year : 2011-12)

Thyssenkrupp Industrial Solutions (India) Pvt.
Ltd., (Formerly known as Uhde India Pvt. Ltd.
Uhde House, L.B.S. Marg, Vikhroli (West)
Mumbai 400 083 PAN – AAACU1416H

..... Appellant

v/s

Dy. Commissioner Of Income Tax
Range-15(3)(1), Mumbai

.....Respondent

Assessee by : Shri H. Jamshedji a/w

Shri M.M. Golvala

Revenue by : Shri Chandra Vijay

Date of Hearing – 18/05/2022

Date of Order – 22/07/2022

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the final assessment order dated 19/01/2016, passed under section 143(3) read with section 144C(13) of the Income Tax Act, 1961 (*'the Act'*) by the Assessing Officer, for the assessment year 2011-12.

2. In this appeal, assessee has raised following grounds: –

"Both the lower authorities erred in assuming jurisdiction to make a Transfer Pricing addition of Rs.3,70,02,253/-, in respect of reimbursement of expenses.

2. *The learned Deputy Commissioner of Income Tax-15(3)(1), erred in making a transfer pricing adjustment of Rs. 3,70,02,253/-on account of reimbursement of expenses from the overseas AE not having been at Arm's Length.*
3. *The learned Deputy Commissioner of Income Tax - 15(3)(1), erred in determining ALP of reimbursements expenses paid to AEs at Rs. Nil, by rejecting the contention of the Appellant that the reimbursement of expenses are paid on actual basis without any mark-up and further erred in rejecting the CUP method followed, without applying any method himself.*
4. *The learned Deputy Commissioner of Income Tax-15(3)(1), erred in disallowing provision for costs incurred on completed contracts amounting to Rs.1,12,70,129/-.*
5. *The learned Deputy Commissioner of Income Tax 15(3)(1) erred in not considering that the provisions were made as per the regular method of accounting followed by the appellant.*
6. *The learned Deputy Commissioner of Income Tax - 15(3)(1) erred in not deleting provisions for costs on completed contracts amounting to Rs 1,19,70,371/- which has been disallowed in earlier assessment years and were utilized/written back in the current year.*
7. *The learned Deputy Commissioner of Income Tax-15(3)(1) erred in not allowing deduction of an amount of Rs.7,73,11,821/-, in respect of contracts accounted under "Percentage of Completion" (POC) Method, following his own method of accounting adopted by him in previous years.*
8. *The learned Deputy Commissioner of Income Tax-15(3)(1) erred in not deleting excess of progress billings over sales recognized in respect of contracts accounted under the "Percentage of Completion Method" amounting to Rs 3.98.88,530/- which has been taxed in the immediately preceding assessment year, and which were offered to tax as sales in the current year.*
9. *The learned Deputy Commissioner of Income Tax-15(3)(1) erred in confirming taxation of an amount of Rs.6,43,375/-, as income, in respect of contracts accounted under the "Completed Contract Method" where the progress billings were in excess of accumulated costs incurred.*
10. *The learned Deputy Commissioner of Income Tax-15(3)(1) erred in rejecting the regular method of accounting followed by the appellant and accepted by the Department in the past.*
11. *The learned Deputy Commissioner of Income Tax-15(3)(1) erred in not deleting excess of progress billings over accumulated costs incurred in respect of contracts accounted under the "Completed Contract Method" amounting to Rs.9,62,40,846/- which has been taxed in the immediately*

preceding assessment year and which were offered to tax as sales in the current year.

12. The learned Deputy Commissioner of Income Tax-15(3)(1) erred in not granting deduction in respect of depreciation of Rs.9,02,415/- on software expenses disallowed as capital expenditure in earlier years.

13. The learned Deputy Commissioner of Income Tax-15(3)(1) erred in levying interest u/s 234B and 234C of the Act."

Additional Ground of Appeal

"1. The Appellant submits that the liability incurred on account of Education Cess and Higher and Secondary Education Cess on Income tax amounting to Rs. 69,98,149 should not be disallowed under section 40(a)(ii).

2. The Appellant relies on the judgement dated 28 February, 2020 of the Bombay High Court in Sesa Goa Ltd. v. JCIT (ITA No. 17 and 18 of 2013 dated 28 February, 2020)."

3. The issue arising in grounds no. 1 to 3, raised in assessee's appeal, is pertaining to transfer pricing adjustment of Rs.3,70,02,253, in respect of reimbursement of expenses.

4. The brief facts of the case pertaining to this issue, as emanating from the record, are: The assessee is engaged in the business of design, construction, installation and commissioning of industrial plants for the chemical, petrochemical, fertiliser and related industries. For the year under consideration, assessee filed its return of income on 25/11/2011, declaring total income of Rs.73,03,21,069. During the year under consideration, assessee entered into following international transactions with its associated enterprises:

<i>Sl. No.</i>	<i>Transaction</i>	<i>F.Y. 2010-11</i>	<i>Method</i>
<i>1.</i>	<i>Purchase of equipments and</i>	<i>438958240</i>	<i>TNMM</i>

	<i>its part</i>		
2.	<i>Provision of Engineering service (Received)</i>	<i>415695135</i>	<i>TNMM</i>
3.	<i>Availing of Engineering service (Received)</i>	<i>194056575</i>	<i>TNMM</i>
4.	<i>Availing of Deputation of Personnel (Payment)</i>	<i>9787046</i>	<i>TNMM</i>
5.	<i>Availing of Email Services (Payment)</i>	<i>938407</i>	<i>TNMM</i>
6.	<i>Royalty</i>	<i>11514563</i>	<i>TNMM</i>
7.	<i>Availing of software licenses (Payment)</i>	<i>18152538</i>	<i>TNMM</i>
8.	<i>Availing of guarantee</i>	<i>6160800</i>	<i>TNMM</i>
9.	<i>IT Support services</i>	<i>22445815</i>	
10.	<i>Purchase of Book</i>	<i>5914</i>	
11.	<i>Deputation of Personnel (received)</i>	<i>855275</i>	<i>CUP</i>
12.	<i>Reimbursement of expenses (received)</i>	<i>15157492</i>	<i>CUP</i>
13.	<i>Reimbursement of expenses (paid)</i>	<i>37002253</i>	<i>CUP</i>

5. During the year under consideration, the assessee has reimbursed certain expenses, like salary, software expenses, travel, telephone, insurance, courier charges, training expenses, accommodation and other expenses incurred by the associated enterprises on behalf of the assessee. These expenses were reimbursed by the assessee to the associated enterprise on actual basis without any markup. As, third party cost which was initially incurred by the associated enterprise and later reimbursed by the assessee is the Comparable Uncontrolled Price ('CUP') for the reimbursement, accordingly CUP method was adopted as the most appropriate method for benchmarking this transaction.

6. The Assessing Officer made reference to the Transfer Pricing Officer ('TPO') for determination of arm's length price of the international

transactions entered into by the assessee. The TPO vide order dated 19/12/2014, passed under section 92CA(3) of the Act after noting that the assessee has failed to establish necessity, receipt, request, rendition and benefit of the services in respect of which cost was reimbursement by the assessee to its associated enterprise, treated the arm's length price of international transaction pertaining to '*Reimbursement of Expenses*' as NIL. In conformity, the Assessing Officer passed the draft assessment order dated 25/03/2015.

7. The learned Dispute Resolution Panel ('DRP') vide directions dated 14/12/2015, issued under section 144C(5) of the Act rejected the objections filed by the assessee by holding that the assessee has failed to satisfy '*benefit test*' and the '*willingness to pay test*'. Accordingly, the Assessing Officer passed the impugned final assessment order dated 09/01/2016. Being aggrieved, the assessee is in appeal before us.

8. During the course of hearing, learned Authorised Representative ('*learned AR*') submitted that the assessee has reimbursed certain expenses incurred by the associated enterprises on behalf of the assessee. These arrangements are purely from an administrative convenience perspective and the primary liability is towards a third party. These expenses are paid on actual basis without any markup, out of which no income or expense arises in the hands of the assessee. The learned AR further submitted that all back-to-back invoices are available and part of the paper book and since direct comparable transaction in

terms of cost paid to the third party was available, this transaction was benchmarked by applying CUP method.

9. On the other hand, learned Departmental Representative ('learned DR') vehemently relied upon the orders passed by the lower authorities.

10. We have considered the rival submissions and perused the material available on record. During the year under consideration, assessee reimbursed expenditures in the nature of salary, software expenses, telephone, travel, insurance, courier charges, training expenses, accommodation other expenses to the associated enterprise for the cost incurred on behalf of the assessee. Such reimbursement was made by the assessee without paying any markup on the cost. The TPO as well as the learned DRP treated the arm's length price of this transaction at NIL on the basis that assessee has failed to justify/prove rendition, necessity and benefit of this expenditure. The learned DRP termed it as '*benefit test*' and the '*willingness to pay test*', which was alleged to be not satisfied by the assessee. We find that during the course of transfer pricing assessment proceedings, the assessee filed the details of reimbursement paid to the associated enterprises. We find that in respect of the salary expenditure the assessee furnished the certificate issued by the statutory auditor, wherein it was certified that the cost recoverable from the assessee is the salary of the Managing Director of the assessee and same is based on actual cost incurred by the associated enterprise without any markup profit element included therein. The assessee also produced a

copy of the invoice raised by the AE on the assessee in respect of the salary expenditure. We further find that assessee furnished the back-to-back invoices raised by the third-party on the associated enterprise to substantiate its claim of reimbursement of costs to the associated enterprise. The lower authorities without finding any fault in the benchmarking analysis conducted by the assessee, i.e. by treating the cost paid to the third-party as the perfect CUP, considered the arm's length price of the transaction as NIL only by applying the so called '*benefit test*' and the '*willingness to pay test*'. The TPO also neither undertook any benchmarking analysis nor searched any comparable transaction for considering the arm's length price at NIL. In this regard, it is relevant to note following observations of Hon'ble Delhi High Court in Cushman and Wakefield (India) Pvt. Ltd. [2014] 367 ITR 730 (Del.).

"35. The TPO's Report is, subsequent to the Finance Act, 2007, binding on the AO. Thus, it becomes all the more important to clarify the extent of the TPO's authority in this case, which is to determining the ALP for international transactions referred to him or her by the AO, rather than determining whether such services exist or benefits have accrued. That exercise - of factual verification is retained by the AO under Section 37 in this case. Indeed, this is not to say that the TPO cannot - after a consideration of the facts - state that the ALP is 'nil' given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the TPO stating that the assessee did not benefit from these services, which amounts to disallowing expenditure."

11. As noted above, in the present case, no search was conducted to find out the independent entity in a comparable transaction and the arm's length price of the international transaction was treated to be NIL. In the present case, no doubts about payments made by the assessee have

been raised by the Assessing Officer under section 37 of the Act. Further, accrual of benefit to assessee or the commercial expediency of any expenditure incurred by the assessee cannot be the basis for disallowing the same, as held by Hon'ble Delhi High Court in the case of EKL Appliances Ltd. [2012] 345 ITR 241 (Del.).

12. We further find that Hon'ble jurisdictional High Court in CIT v/s Lever India Exports Ltd. [2017] 246 Taxmann 133 (Bombay), observed as under:

"7. We note that the Tribunal has recorded the fact that the respondent assessee has launched new products which involved huge advertisement expenditure. The sharing of such expenditure by the respondent assessee is a strategy to develop its business. This results in improving the brand image of the products, resulting in higher profit to the respondent assessee due to higher sales. Further, it must be emphasized that the TPO's jurisdiction was to only determine the ALP of an International Transaction. In the above view, the TPO has to examine whether or not the method adopted to determine the ALP is the most appropriate and also whether the comparables selected are appropriate or not. It is not part of the TPO's jurisdiction to consider whether or not the expenditure which has been incurred by the respondent assessee passed the test of Section 37 of the Act and/or genuineness of the expenditure. This exercise has to be done, if at all, by the Assessing Officer in exercise of his jurisdiction to determine the income of the assessee in accordance with the Act. In the present case, the Assessing Officer has not disallowed the expenditure but only adopted the TPO's determination of ALP of the advertisement expenses. Therefore, the issue for examination in this appeal is only the issue of ALP as determined by the TPO in respect of advertisement expenses. The jurisdiction of the TPO is specific, and limited i.e. to determine the ALP of an International Transaction in terms of Chapter X of the Act read with Rule 10A to 10E of the Income Tax Rules. The determination of the ALP by the respondent assessee of its advertisement expenses has not been disputed on the parameters set out in Chapter X of the Act and the relevant Rules. In fact, as found both by the CIT (A) as well as the Tribunal that neither the method selected as the most appropriate method to determine the ALP is challenged nor the comparables taken by the respondent assessee is challenged by the TPO. Therefore, the ad-hoc determination of ALP by the TPO dehors Section 92C of the Act cannot be sustained."

13. We further find that the Co-ordinate Bench of Tribunal in Hamon Colling Systems Pvt Ltd. v. DCIT, in ITA No. 3911/Mum./2015, vide order dated 27/05/2020, after considering aforesaid decisions observed as under:

"9.Neither the ALP adjustments can be equated with disallowances of expenses, even though effect may be same, nor the TPO has the authority to disallow the expenses. Clearly, the impugned ALP adjustments are vitiated in law for this short reason alone. In any case, the observations with respect to the lack of evidence in support of the benefits is based on sweeping generalizations and is incapable of sustaining legal scrutiny."

14. In view of the above, we are of the considered opinion that TPO as well as learned DRP were not justified in treating the value of international transaction of 'Reimbursement of Expenses' to be NIL, in the present case. Accordingly, grounds no. 1 to 3 raised in assessee's appeal are allowed.

15. The issue arising in grounds no. 4 and 5, raised in assessee's appeal, is pertaining to disallowance of provision for costs incurred on completed contracts.

16. The brief facts of the case pertaining to this issue, as emanating from the record, are: During the course of assessment proceedings, it was observed that assessee has, inter-alia, made a provision for costs on completed contracts of Rs. 1,12,70,129. Accordingly, assessee was asked to furnish details and justification for claim of provision in the profit and loss account for the year under consideration. In reply, assessee submitted that as the contract reaches substantial completion, the

assessee recognises total revenue and total contractual profits taking into account committed cost which are crystallised based on the expert advice of the engineering/Project departments of the company and the discussion with the client and punch list provided by the client. The assessee further submitted that at this stage, the final acceptance of the client is still pending and the assessee recognises the total contractual profits and also actual cost incurred and the committed crystallised costs which are shown as provisions by the assessee, based on internal documentation maintained by the assessee. The Assessing Officer vide draft assessment order dated 25/03/2015 passed under section 143(3) read with section 144C(1) of the Act treated the liability for the cost overrun as an unascertained liability and accordingly, disallowed the provision of Rs. 1,12,70,129.

17. The learned DRP vide directions issued under section 144C(5) of the Act rejected the objections filed by the assessee. Accordingly, the Assessing Officer passed the impugned final assessment order dated 09/01/2016. Being aggrieved, the assessee is in appeal before us.

18. During the course of hearing, learned AR submitted that this issue is covered by the decision of coordinate bench of the Tribunal in assessee's own case in preceding assessment years. On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

19. We have considered the rival submissions and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee's own case in UHDE India Private Limited v/s ACIT, in ITA No. 1690/Mum./2012, vide order dated 04/07/2014, for assessment year 2005-06, while deciding similar issue in favour of the assessee, observed as under:

"2.5. We have heard the rival submissions and perused the material before us. In our opinion PCCC is based on identified liability, though it is only an estimate."In the year under appeal the assessee had made provisions for eleven unfinished projects and in subsequent two years after completing the projects wrote off the provisions and offered the balance for taxation. We further find that in those years the assessee had written back the balance amount and same was taxed by the AO.In our opinion, the AO cannot take two stands-he cannot tax the assessee in later years for a part of transaction for which provision has been made for earlier years In the commercial world provisions are made for contingencies and court are of view that same have to allowed.AS-7 recongises the principal of making provisions for certain expenses. It is a normal feature of business world that at the end of a particular AY, it may not be possible for an assessee to determine the probable future expenditure of an ongoing project or scheme. If it recognises income from such project in that year, it will have to make some reasonable provisions for the expenditure to be incurred in subsequent year Provision will vary from project to project and from year to year. It would also depend on stage of completion of the project. For that purpose assessee will have to rely on earlier years' experience and report of the technical personnel Question of provisions for warranty was discussed at length by the Hon'ble Apex Court in the matter of Rotork Controls India P. Ltd.(314 ITR 62) We are aware that warranty cannot be equated with provisions made for the projects to be completed by an assessee, but the principle laid down by the Hon'ble Court are applicable to the case under consideration Provision after all is only an estimation of probable expenditure to be incurred after the end of a particular year. Besides, in our opinion travelling cost of the engineers and technical staff, testing cost, supplies of replacement spares, site related costs, cost of completion of punch list work, cost of modification for uncompleted projects has to be considered while making provisions when an assessee carries out a business of providing diversified engineering services. We find that the assessee had to make provisions for additional cost if sustainable production capability is not demonstrated within the guarantee period. In such cases cost provisions had to be made even after acceptance/conditional acceptance of a plant.

We find that the FAA has disallowed provisions on the basis that the assessee had written back the amounts in subsequent years. He has not analysed the data of earlier years and subsequent years to determine the alleged unreasonableness of the provisions. It is a fact that res judicata is not applicable to income tax proceedings and every year is an independent unit, but rule of consistency contemplates that the AO should not suddenly disallow any item without assigning some reason. From the order of the AO/FAA we are unable to find as how the facts and circumstances in the year 2001-02 were different from the facts for the year under consideration. Assessee was following the same system of making provisions for uncompleted projects for last so many years. There is nothing in the order of the FAA that could prove that provisions made by the assessee were not based on estimate given by experts. We have perused the paper book it is found that internal memos are signed by one person, but the estimate of provision was prepared by three/four competent authorities, dealing with financial and technical sides of the projects (page 83, 89, 124, 138 of the PB). In short, the assessee was following some system in estimating provisions. Therefore, without pointing out major defects it was not proper on part of the FAA to state that system was. FAA has given his finding without giving the reasons. In our opinion writing off of provisions in subsequent years cannot be basis for disallowing it. Accounting standards expect that assessee should write back such amounts in later years. FAA has overlooked the fact that out of the provisions made by the assessee, Rs.3.70 Crores were actually spent by the assessee in the subsequent years to complete the unfinished projects or to render further services. Therefore, in our opinion, he was not justified in confirming the disallowance of Rs. 8.14 Crores, without analysing the terms and conditions of the projects threadbare for which provisions were made during the year under appeal. Reversing his order we decide first effective ground of appeal (ground no. 1-3) in favour of the assessee."

20. Similarly, the coordinate bench of the Tribunal in assessee's own case for subsequent assessment years i.e. 2006-07, 2007-08 and 2009-10, in ITA No. 1691/Mum./2012, ITA no. 1904/Mum./2012 and ITA no. 1245/Mum./2014, respectively, decided similar issue in favour of the assessee. The learned Departmental Representative could not show us any reason to deviate from the aforesaid orders and no change in facts and law was alleged in the relevant assessment year. The issue arising in the present case is recurring in nature and has been decided in favour of the assessee by the decision of the coordinate bench of the Tribunal for

preceding assessment years. Thus, respectfully following the orders passed by the coordinate bench of the Tribunal in assessee's own case cited (supra), we uphold the plea of the assessee and delete the impugned disallowance of provision for costs incurred on completed contracts. Accordingly, grounds no. 4 and 5 raised in assessee's appeal are allowed.

21. The issue arising in grounds no.9 and 10, raised in assessee's appeal, pertains to taxability of excess of progress billings over accumulated costs incurred.

22. The brief facts of the case pertaining to this issue, as emanating from the record, are: The Assessing Officer vide draft assessment order treated the excess of progress billings over inventories as on 31/03/2011 amounting to Rs. 6,43,375 as income of the assessee.

23. The learned DRP vide directions issued under section 144C(5) of the Act rejected the objections raised by the assessee. Accordingly, the Assessing Officer passed the impugned final assessment order dated 09/01/2016. Being aggrieved, the assessee is in appeal before us.

24. During the course of hearing, learned AR submitted that this issue is covered by the decision of coordinate bench of the Tribunal in assessee's own case in preceding assessment years. On the other hand, learned DR vehemently relied upon the orders passed by the lower authorities.

25. We have considered the rival submissions and perused the material available on record. We find that the coordinate bench of the Tribunal in assessee's own case in Thyssenkrupp Industrial Solutions (India) Pvt. Ltd. v/s ACIT, in ITA No. 1691/Mum./2012, vide order dated 09/04/2019, for assessment year 2006-07, while deciding similar issue in favour of the assessee, observed as under:

"2.6.3 Upon careful consideration, we find that the assessee has accumulated cost as well as revenue under these projects in the Balance Sheet by following completed contract method. The revenue has accepted such accumulation during A.Ys 2004-05 & 2005-06 and this is the third year of accumulation under the projects. It is not the case of the revenue that the income under these projects have not been offered to tax in subsequent years. No case of revenue leakage has been established before us. Therefore, the action of revenue in disturbing the consistent method of accounting being followed by the assessee could not be held to be justified. Hence, we delete the impugned additions and allow these grounds of appeal."

26. Similarly, the coordinate bench of the Tribunal in assessee's own case for subsequent assessment years i.e. 2008-09, 2009-10 and 2010-11, in ITA No. 3775/Mum./2016, ITA no. 1245/Mum./2014 and ITA no. 6163/Mum./2014, respectively, decided similar issue in favour of the assessee. The learned Departmental Representative could not show us any reason to deviate from the aforesaid orders and no change in facts and law was alleged in the relevant assessment year. The issue arising in the present case is recurring in nature and has been decided in favour of the assessee by the decision of the coordinate bench of the Tribunal for preceding assessment years. Thus, respectfully following the orders passed by the coordinate bench of the Tribunal in assessee's own case

cited (supra), we uphold the plea of the assessee and delete the impugned addition made by the Assessing Officer. Accordingly, grounds no. 9 and 10 raised in assessee's appeal are allowed.

27. Grounds No. 6, 7, 8, 11 and 12 were not pressed during the course of hearing. Accordingly, the aforesaid grounds are dismissed as not pressed.

28. Ground No. 13 raised in assessee's appeal is pertaining to levy of interest under section 234B and 234C of the Act, which is consequential in nature. Thus, ground No. 13, is allowed for statistical purpose.

29. In this appeal, assessee has also filed an application seeking admission of additional ground of appeal. However, during the course of hearing the said application was not pressed by the learned AR. Accordingly, the application seeking admission of additional ground is dismissed.

30. In the result, appeal by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 22/07/2022

Sd/-
PRAMOD KUMAR
VICE PRESIDENT

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 22/07/2022

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