IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 2224/Del/2018
(Assessment Year : 2009-10)

DCIT Circle – 2(1), Gurgaon **PAN No. AAACO 0160 A**	Vs.	OSRAM India Pvt. Ltd., Signature Towers, 11th Floor, Tower – B, South City – 1, Gurgaon PIN : 122 002
(APPELLANT)		**(RESPONDENT)**

Assessee by	Shri Ajit Jain & Saksham Jain, C.A. Shri Dhruv Seth, Adv.
Revenue by	Shri Mrinal Kumar Das, Sr. D.R.

Date of hearing:	25.08.2022
Date of Pronouncement:	22.09.2022

ORDER

PER ANIL CHATURVEDI, AM:

This appeal filed by the Revenue is directed against the order dated 15.01.2018 passed by the Commissioner of Income Tax (Appeals)-I, Gurgaon relating to Assessment Year 2009-10.

2. Brief facts of the case as culled out from the material on record are as under :-

3. Assessee is a 100% subsidiary of OSRAM GMBH, Germany and stated to be engaged in manufacturing and trading of lamps

and providing designing services for software and electronic ballasts. Assessee filed its return of income for A.Y. 2009-10 on 29.09.2009 declaring loss of Rs.4,73,01,883/-. The case was selected for scrutiny and notices u/s 143(2) and 142(1) of the Act were issued and served on the assessee. During the course of assessment proceedings, AO noticed that assessee had entered into international transactions with its Associated Enterprises (AE's). Accordingly, a reference was made to TPO to determine Arm's Length Price (ALP) of the international transactions entered by the assessee with its AE's. The TPO vide order dated 30.01.2013 passed u/s 92CA of the Act proposed an adjustment of Rs.4,96,10,800/- to the income of the assessee. AO, thereafter, passed assessment order u/s 144C of the Act dated 21.05.2013 and determined the total income at Rs.4,96,35,422/-.

4. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who vide order dated 15.01.2018 in Appeal No.153/2013-14 granted substantial relief to the assessee. Aggrieved by the order of CIT(A), Revenue is now in appeal and has raised the following grounds:

"1. The Ld. CIT(A) has erred on facts and in the law in allowing the working capital adjustment to the account for difference in the working capital position of the appellant and the comparable companies for the period under consideration.

2. The Ld CIT has erred in deleting some comparables selected by the TPO only on the basis that these comparables have been rejected by the TPO himself in the subsequent years thereby failing to appreciate that the TPO had conducted a systemic and comprehensive search on various parameter before selecting those

comparables. The CIT(A) has failed to appreciate that only those comparables are selected in a particular year which pass the filters applied. Therefore, comparable can't be rejected in subsequent years as the comparable would have failed in the filters applied during TP proceedings for those years.

3. *Ld CIT(A) has erred in deleting the disallowance of Rs.4,70,71,208/- made by the AO on account of printing on the packing material. Ld CIT(A) has not appreciated the facts that the AO has relied upon the case law of Hon'ble Bombay High Court in the case of 'Sarvodya Printing Press vs State of Maharashtra (1994 93 STC 387).*

4. *That the appellant craves for the permission to add, delete or amend grounds of appeal before or at the time of hearing of appeal."*

5. **Ground No.1** is with respect to the adjustment on account of working capital.

6. Before the TPO, assessee had sought adjustment for working capital to account for difference in the working capital position of the assessee and the comparable companies. The TPO had denied the working capital adjustment in view of observation at para 15 onwards. The main reason for denial of working capital adjustment by the TPO was apart from the issue of unreliable data, there was an issue of inadequate data in the case of comparable companies. He was further of the view that working capital adjustment needs to be given on the basis of daily or at least monthly average payables, receivables and inventory and not on the basis of yearend figures. He was further of the view that though the daily and monthly figures of receivables, payables and inventory may be available in the case of the assessee but the

same are not available in the case of comparable companies. TPO was further of the view segmental data may be available for Profit & Loss account but the same may not be available for Balance Sheet items and therefore, the calculation of reasonably accurate adjustments was not possible. He was further of the view that the issue of working capital adjustment will be relevant only when there is a situation of inventory remaining tied up or receivable being held up. According to AO, this situation may not be relevant to the service industry. He observed that the assessee has not been able to demonstrate with evidence that the difference in working capital deployed is making a difference in the margin earned by the assessee and the comparables. He further noted that out of the three components of working capital namely payables, receivable and inventory only one component is effected on account of transactions with the Associated Enterprises (AEs) i.e. receivable. TPO, therefore, was of the view that to allow working capital adjustment on all the three components even though transactions with the Associated Enterprises (AEs) effect only one of them was not justified. He accordingly, denied the working capital adjustment to the assessee.

7. Aggrieved by the order of AO, assessee carried the matter before CIT(A). Before CIT(A), it was *inter alia* submitted that the TPO has granted working capital adjustment to the assessee in A.Ys. 2010-11 & 2011-12. Before CIT(A) assessee also relied on the various decisions cited by the CIT(A) in his order. CIT(A) after considering the submissions made by assessee and relying on the

order of the Hon'ble Delhi Tribunal in the case of **Sony Mobile Communications International AB vs. Deputy Director of Income-tax [2016] 69 taxmann.com 404** held that assessee is entitled to working capital adjustment. He therefore, directed the AO/TPO to grant working capital adjustment. Aggrieved by the order of CIT(A), Revenue is now before us.

8. Before us, Learned DR took us to the finding and observations of TPO and supported his order.

9. Learned AR on the other hand reiterated the submissions made before lower authorities and submitted that on identical facts, the TPO has granted working capital adjustment to the assessee in A.Y. 2010-11 & 2011-12. He further submitted that Hon'ble Delhi Tribunal in the case of Sony Mobile Communication International AB (supra) did not accept the proposition furnished by Revenue that the working capital adjustment cannot be allowed to the assessee in service industry and it is restricted to inventory trade, receivable trade and payable only. Learned AR, therefore, submitted that CIT(A) after considering various decisions has decided the issue in favour of the assessee and, therefore, ground of the Revenue needs to be dismissed.

10. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the working capital adjustment that was sought by the assessee and allowed by the Ld CIT(A). We find that CIT(A)

after considering the fact that the TPO has himself given the working capital adjustment to the assessee in A.Ys. 2010-11 & 2011-12 and after relying on the various decisions cited in his order has held that assessee is entitled to work in capital adjustment. We find that the Co-ordinate Bench of Tribunal in the case of Sony Mobile Communication International SB (supra) has held that working capital adjustment cannot be denied to the assessee if it is a service industry. It has further observed that in order to neutralize the differences on account of carrying high or low inventory, trade payables and trade receivables, as the case may be, it becomes eminent to allow working capital adjustment so as to bring the case of the assessee at par with other functionally comparable entities. It has further, by relying on the decision of the Tribunal in the case of Navisite India Pvt. Ltd. vs. ITO has held that the component of working capital deployed should be considered on annual basis with the average of opening and closing figures.

11. Before us, Revenue has not pointed to any distinguishing feature in the facts of the case in the year under consideration and that of the earlier year. Revenue has also not placed any material on record to demonstrate that the decision relied upon by the CIT(A) has been stayed/set aside/overruled by higher judicial forum. In such a situation, we find no reason to interfere with the order of CIT(A) and **thus the ground of Revenue is dismissed.**

12. **Ground No.2** is with respect to the exclusion of comparables.

13. The assessee in the TPO study has selected certain comparable companies. The TPO had rejected some of the comparables selected by the assessee and had included fresh comparables for the purpose of determination of Arm's Length Price (ALP). Assessee had objected to the comparables that were included by TPO. TPO, however, did not accept the objection raised by assessee and proceeded to determining the Arm's Length Price.

14. Aggrieved by the order of TPO, assessee carried the matter before CIT(A). CIT(A) at para 7.12 (pages 23-26) of his order has tabulated the assessee's contentions with respect to the comparables selected by TPO and the TPO's remark. After considering the assessee's contentions and TPO's remark, CIT(A) noted that TPO has not dealt with the specific objections raised by the assessee but had simply relied upon the general observations made in the order. He has further noted that while rejecting the objections of the assessee with respect to the comparables he has only referred to the general profile of the company without going into the details. He has further noted that for the inclusion of the comparables, there was objection on account of functional dissimilarity but the objections raised by the assessee were not addressed by TPO. He has further given a finding that on identical facts in assessee's own case, the TPO in

the assessment proceedings for A.Y. 2010-11, 2011-12, 2012-12 & 2013-14 had rejected the comparables. CIT(A), thereafter, directed the TPO to carry out the bench marking based on comparable companies listed at para 7.17 of the order.

15. Aggrieved by the order of CIT(A), Revenue is now before us.

16. Before us, Learned DR supported the order of TPO and further submitted that principle of res judicata is not applicable to the Income-tax cases and each year has to be considered on standalone basis and therefore CIT(A) was not justified in directing the exclusion of comparables selected by TPO.

17. Learned AR on the other hand reiterated the submissions made before the lower authorities and supported the order of CIT(A).

18. We have heard the rival submissions and perused the material available on record. We find that CIT(A) after considering the material on record has decided the issue in favour of the assessee by observing as under:

> *7.13 I have examined the issue above and find that TPO in his order did not dealt with the specific objections raised by the appellant in respect of most of the above mentioned cases but simply relied upon general observations made in the order.*
>
> *7.14 Specific discussions of comparables has been made in para 12 only. In this paragraph even though TPO has dealt with individual comparables but most of the paragraphs contain*

extract of general profile of the company(comparable) and in most of the cases TPO has appended a last line that ***the objections of tax payer has already been dealt in general discussion above.***

7.15 In the background above when most of the objections raised by the appellant are specific which have not been dealt by the TPO, there appears to be little basis to come to a conclusion that these cases are comparable to the appellant. In almost all the cases there an objection of functional dissimilarity and before drawing adverse inference based on these comparable it was incumbent upon him to address the objections raised. Furthermore, as mentioned above the rejection of these comparables in the accept/reject matrix has been accepted by the TPO in prior and subsequent years.

7.16 It is seen from the facts discussed above that some of the objections raised by the appellant before the TPO have not been dealt with during the course of proceedings before the TPO. It is also evident from the facts recorded above that similar issue of comparables was also examined by the TPO in the assessment proceedings for AY 2010- 11, 2011-12, 2012-13 and 2013-14 wherein the aforesaid comparables were considered and based on the facts of each comparables some of the comparables were rejected in all the 4 subsequent years.

7.17 Keeping in view the aforesaid facts, it is held that the comparables which were rejected in all the 4 subsequent years was not be adopted for arriving at Arm's Length Margin in the current year. Further, as pointed out above out of the 4 comparables adopted by the appellant in the TP study, the TPO had objected to only 3 of the comparables and regarding Tata Elxsi Ltd. the TPO had mentioned that it was a good comparable but had not adopted the same in the final list of comparables. As such, the TPO is directed to adopt the following comparables for the purpose of arriving at Arm's Length Margin of the segment. In consideration of the discussion above, TPO is directed to carry out benchmarking based on the following comparables:-

S. No.	Name of the Company
1	*Tata Elxsi Limited*
2	*Engineers India Ltd.*
3	*IBI Chemature (Engineers & Consultants) Ltd.*
4	*Indus technical & financial corporation*
5	*MN Dastur*
6	*Mahindra Consulting Engineers Ltd.*
7	*Rites Ltd.*
8	*TCE Consulting Engineers Ltd.*

19. As far as objection of the Learned DR that principle of res judicata is not applicable to Income-tax cases, we have no hesitation in accepting the aforesaid principle but at the same time, various courts have held that even if the principle of res-judicata does not apply to tax matter but in the absence of any material change justifying the revenue to take a different view of the matter, the position of fact accepted by Revenue over a period of time should not be allowed to be reopened unless revenue is able to establish compelling reasons for a departure from the settled position. Before us, no distinguishing feature in the facts of the case in the year under consideration and that of the earlier year has been pointed out by Revenue. In such a situation, we find no reason to interfere with the order of CIT(A) and **thus the ground of Revenue is dismissed.**

20. **Ground No.3** is with respect to deleting the disallowance of Rs.4,70,71,208/- on account of printing of packing material.

21. During the course of assessment proceedings and on perusing the details, AO noticed that assessee has claimed Rs.4,70,71,208/- on account of packing material consumed. The

assessee was asked to explain as to whether any TDS was deducted on those expenses to which assessee *inter alia* submitted that no TDS has been deducted as all the packing material consumed during the year was purchased under contract for sale and did not involve any job work. The submissions of the assessee was not found acceptable to AO. AO was of the view that the packing material on which printing has been made as per the specifications given by the assessee is a work contract involving job work. AO also relied on the decision of **Hon'ble Bombay High Court in the case of Sarvodya Printing Press vs. State of Maharashtra (1994) 93 STC 387** to hold that the contract involved job work and, therefore, assessee was liable to deduct TDS. AO noted that assessee had violated the provision of Section 194C of the Act by not deducting TDS. He accordingly, held that on account of non deduction of TDS the expenditure incurred for packing material was not allowable in view of the provisions of Section 40(a)(ia) of the Act. He, accordingly, disallowed the amount of Rs.4,70,71,208/-.

22. Aggrieved by the order of AO, assessee carried the matter before CIT(A). CIT(A) by following the decision of the Tribunal in assessee's own case and noting that the facts in the year under consideration were identical to that of earlier years, deleted the addition made by AO. Aggrieved by the order of CIT(A), Revenue is now before us.

23. Before us, Learned DR took us to the findings of AO and placing reliance on the decision noted by AO in the case of Sarvodya Printing Press (supra) and decision in the case of State of Tamil Nadu vs. Anandam Viswanathan 1989 SCR (1) 301 submitted that Hon'ble CIT(A) has erred in deleting the addition made by AO.

24. Learned AR on the other hand reiterated the submissions made before lower authorities and further submitted that identical issue arose in assessee's own case before the Tribunal in A.Ys. 2005-06 & 2006-07 and Tribunal vide order dated 14.12.2012 has decided the issue in favour of the assessee. He further placed reliance on the decision of Hon'ble Delhi High Court in the case of CIT vs. Dabur India Ltd. (2006) 283 ITR 197 (Delhi) and submitted that the Hon'ble High Court while deciding the issue in favour of the assessee has also considered the decision of Hon'ble Apex Court in the case of State of Tamil Nadu vs. Anandam Viswanathan (supra) which is relied upon by the Learned DR. He therefore submitted that the ground of Revenue be dismissed.

25. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the deletion of disallowance made u/s 40(a)(ia) of the Act. We find that the disallowance was made by AO on account of non-deduction of TDS u/s 194C of the Act on the printing material consumed by the assessee. CIT(A) while deleting

the addition has given a finding that similar addition made by AO in A.Ys. 2005-06, 2006-07 was deleted by the Co-ordinate Bench of Tribunal. Before us, Revenue has not pointed any distinguishing feature in the facts of the case for A.Ys. 2005-06 & 2006-07 and in the year under consideration. We further find that Hon'ble Delhi High Court in the case of Dabur India Ltd. (supra) held printing of the labels on the corrugated boxes did not require any special skill or involve any confidence or secrecy and therefore, the Tribunal was justified in holding that the predominant object underlying the contract was one for sale of goods which took the contract out of the purview of Section 194C of the Act. We further find that Hon'ble Delhi High Court while deciding the issue in the case of Dabur India (supra) had also considered the decision in the case of Anandam Viswanathan (supra) relied upon by the Learned DR before us. Considering the totality of the aforesaid facts, we find no reason to interfere with the order of CIT(A) and **thus the ground of Revenue is dismissed.**

26. **In the result, appeal of Revenue is dismissed.**

Order pronounced in the open court on 22.09.2022

Sd/-	Sd/-
(ANUBHAV SHARMA) **JUDICIAL MEMBER**	**(ANIL CHATURVEDI)** **ACCOUNTANT MEMBER**

Date:- 22.09.2022

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI