

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'J' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 1259/Mum/2014 (A.Y. 2009-10)

Owens-Corning (India) Pvt. Ltd. [Formerly known as Owens Corning (India) Ltd.] Ground Floor, Mahindra Tower Road No. 13, Worli Mumbai-400 018.  PAN : AAACO1739M (Appellant)	Vs.	DCIT, Circle 7(1) Aayakar Bhavan M.K. Road Churchgate Mumbai-400 020.  (Respondent)
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Assessee by	Shri Vijay Mehta
Department by	Shri Samuel Pitta
Date of Hearing	29.11.2022
Date of Pronouncement	15.02.2023

O R D E R

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the assessment order dated 22-01-2014 passed by the assessing officer u/s 143(3) r.w.s 144C(13) of the Act for assessment year 2009-10 in pursuance of directions given by Ld Dispute Resolution Panel (DRP). The assessee is aggrieved on the following issues:-

- (a) Transfer Pricing adjustment made in respect of purchase of capital goods from Associated Enterprise (AE).
- (b) Transfer pricing adjustment made in respect of purchase of finished goods from Associated Enterprise (AE).
- (c) Disallowance of claim of amortization of premium paid for leasehold land.
- (d) Disallowance of depreciation on additions to fixed assets made during the period relevant to AY 2006-07.
- (e) Computation of Book profits u/s 115JB of the Act by making additions mentioned in (c) and (d) above.

2. The assessee is a joint venture company between M/s Owens Corning Corporation USA and M/s Mahindra and Mahindra India Ltd, India. The former holds 81.50% of share capital and the later owns 21.50% of share capital. It is engaged in the business of manufacture and trading of Glass force reinforcements, viz., Chopped strand mat, Rovings, Type 30. During the year under consideration, the assessee has entered into international transactions by way of purchase of capital goods and purchase of finished goods from its Associated Enterprises (AE).

3. The first issue relates to the transfer pricing adjustment made in respect of purchase of capital goods from its AEs. It is noticed that the assessee has purchased capital goods valued 2.99 crores from its AE. The assessee has claimed depreciation thereon. The assessee has purchased multiple items of capital goods of smaller values from its AE. The assessee bench marked the above said transaction under TNM Method under its manufacturing segment. With regard to manufacturing segment, the assessee identified 11 comparable companies, whose average margin was 7.09%, while the operating margin earned by the assessee from its manufacturing segment was 16.62%. Hence the assessee claimed that the purchase of capital goods from its AEs is at arms length.

3.1 The Transfer Pricing Officer (TPO) did not accept the transfer pricing study conducted by the assessee. The TPO noticed that the AE has purchased goods and supplied them to the assessee by charging mark-up of 20% of the supplies. In this regard, it was submitted that the AE has charged similar mark-up to the supplies made to other Associated Enterprises and non-AEs also ranging from 13% to 20%.

3.2 The TPO did not accept the TP study as well as the alternative contentions of the assessee. He chose to consider AE as tested party. Accordingly, the TPO identified 12 comparable Indian companies who are

providing marketing support services in India and the average mean margin of those 12 companies worked out to 9.16%. Accordingly, the TPO took the view that the maximum rate of mark-up that could have been charged by the AE should not exceed 9.16%. Accordingly, he made transfer pricing adjustment of Rs.32,44,165/-. The Ld DRP, in principle, confirmed the order of TPO. Since the assessee has submitted that there are mistakes in the computation made by the TPO, it directed the AO/TPO to correct those mistakes. After correction of mistakes, the TP adjustment in respect of capital goods came to be reduced to Rs.27,03,471/-.

3.3 We heard the parties on this issue and perused the record. In our view, the approach adopted by both the assessee and the TPO in determining ALP may not be appropriate in the facts and circumstances of the case. Since the purchase of capital goods does not enter Profit and Loss account (except depreciation on those assets), the TNM method adopted by the assessee, in our view, is not appropriate. The TPO, having selected the foreign AE as tested party, could not have compared the margins earned by Indian Companies providing marketing support services. Besides the above, the contention of the assessee is that the functions of those comparable companies could not be compared with the functions performed by the AE to the assessee. It was also submitted by the assessee that its submissions and explanations have not been properly considered by the TPO. Under these set of facts, we are of the view that this issue requires fresh examination at the end of AO/TPO by selecting most appropriate method to bench mark the transactions of purchase of capital goods.

3.4 It was submitted by the assessee that the AE is purchasing capital goods and supplying them to non-AEs also in other Countries with the mark up ranging from 13% to 20%. Though Ld D.R contended that the non-AEs located in India alone should be considered for this purpose, yet we are of the

view that the margin earned by AE from the transactions entered with non-AEs may be relevant, since the AE has been selected as Tested party. However, we leave this matter open to the wisdom of assessee and the TPO. Accordingly, we restore this issue to the file of TPO/AO for bench marking the purchase of capital goods afresh, in accordance with law.

4. The next issue relates to the transfer pricing adjustment made in respect of purchase of finished goods. The assessee has purchased finished goods from its AE to the tune of Rs.6.91 crores for sale to its customers in India. The assessee adopted Resale Price Method (RPM) as most appropriate method and Gross Profit to Sales as Profit level indicator (PLI). The assessee had declared gross profit loss of 1.30%. It had selected 8 companies and based on multiple years (3 years) data and accordingly, the weighted average margin was worked out at 9.55%. However, the assessee defended its margin stating that it was a business strategy adopted by it to retain its customers and boost sale of manufactured goods.

4.1 The TPO did not accept the contentions of the assessee. He also rejected multiple year data adopted by the assessee. Accordingly, the TPO computed average margin of 8 comparable companies selected by the assessee by adopting single year data, which worked out to 10.70%. Accordingly, he made transfer pricing adjustment of Rs.1,16,92,263/-. The Ld DRP confirmed the same.

4.2 The Ld A.R submitted that the TPO has made adjustment at entity level, while the assessee has purchased finished goods from its AE to the tune of Rs.6.91 crores and from non-AEs to the extent of Rs.5.60 crores. Hence, the TPO should have restricted the adjustment, if any, to the actual purchases made from AE. He further submitted that the TPO could have adopted "internal CUP" as most appropriate method in the instant case, since

the assessee has purchased finished goods from non-AEs also. The Ld A.R also made an alternative contention that the purchase of finished goods should have been aggregated with manufacturing segment and accordingly ALP should have been determined. He submitted that the assessee has incurred loss in the trading segment as a business strategy to boost sale of manufactured products and this aspect should be factored in, while determining the ALP of the purchases made from AEs.

4.3 The Ld D.R submitted that the concept of “business strategy” cannot be applied in transfer pricing provisions. He submitted that the assessee has not furnished segmental results of AE and non-AE transactions, even though it was asked for by the TPO. He further submitted that the assessee has made profits in the earlier years. He also submitted that the majority of functions have been done by the assessee and not by the AE.

4.4 The ld A.R, in the rejoinder, submitted that the assessee is having profits from its manufacturing activity. The assessee has suffered loss in the trading activity as a business strategy in order to maintain its business share and profitability in the manufacturing activity. He further submitted that the transactions entered by the assessee with its AE is a simple purchase of finished goods in the ordinary course of its business.

4.5 We have heard rival contentions and perused the record. The transactions under consideration are purchase of “finished goods” from its AE. It is the submission of the assessee that it has purchased finished goods from non-AEs also. Even though it is contended by the Ld D.R that the assessee has not furnished the segmental details of purchases made from AEs and non-AEs, yet it was stated by the Ld A.R that the assessee is having those details and ready to furnish the same. Hence, we are of the view that

an opportunity may be provided to the assessee. Before us, the Ld A.R also contended that “internal CUP” is the most appropriate method.

4.6 We notice that the assessee has adopted Resale Price Method as most appropriate method in its Transfer pricing study. We are concerned herewith the ALP of purchase of finished goods. In that case, the fact whether those finished goods have been sold at loss or profit is really not relevant for determining ALP of purchase price of finished goods. When the assessee has purchased finished goods from both AEs and Non-AEs, there is merit in the contentions of Ld A.R that “internal CUP” may be most appropriate method. Accordingly, we are of the view that this issue also requires fresh examination at the end of TPO/AO. Accordingly, we set aside the order passed by AO on this issue and restore the same to the file of AO/TPO for determining ALP of purchase of finished goods by adopting most appropriate method. We also make it clear that the transfer pricing adjustment, if any, should be restricted to the purchases made from AE only. The assessee is also directed to furnish all the relevant details before the AO/TPO.

5. The next issue relates to the disallowance of claim of amortization amount premium paid on lease hold land. The Ld A.R submitted that this issue has been decided against the assessee in the earlier years by the Tribunal. He further submitted that the assessee has challenged the decision rendered by the Tribunal by filing appeal before the Hon’ble High Court of Bombay for AY 2004-05 and the same is pending. The Ld A.R further submitted that the assessee has furnished Form no.8 as required u/s 158(1) of the Act and accordingly submitted that the assessee agrees that the decision rendered by Hon’ble Bombay High Court in AY 2004-05 on an identical issue may be applied in this year also.

5.1 We heard Ld D.R on this issue. Having regard to the submissions made by Ld A.R and the Form No.8 filed by the assessee, we restore this issue to the file of AO with the direction to follow the decision that may be rendered by Hon'ble Bombay High Court on an identical issue urged by the assessee before it in AY 2004-05.

6. The next issue urged by the assessee relates to disallowance of depreciation. The Ld A.R submitted that the AO had initially disallowed part of depreciation claim in AY 2006-07 for want of evidences in support of purchase of assets. Consequent thereto, the AO has disallowed part of depreciation in this year also. The Ld A.R submitted that the issue of disallowance of depreciation made in AY 2006-07 was examined by the Tribunal in its order dated 08-05-2019 passed in ITA No.4988/Mum/2011 and the matter was restored back to the file of AO for examining it afresh duly considering the additional evidences furnished by the assessee. Accordingly, he prayed that the decision taken by the AO in the set aside proceedings relating to AY 2006-07 shall have consequential effect on the disallowance of depreciation made in this year. Accordingly, he submitted that this issue may be restored to the file of AO.

6.1 We heard Ld D.R and perused the record. We find merit in the submissions made by Ld A.R. We notice that the AO had disallowed depreciation claim initially in AY 2006-07 and the disallowance made in this year is consequential to the same. Since the Tribunal has restored the matter relating to disallowance of depreciation made in AY 2006-07 to the file of AO for re-examination, it would be proper for us to restore this issue to the file of the assessing officer for examining it afresh in the light of decision taken by him in AY 2006-07 in the set aside proceedings. Accordingly, we restore this issue to the file of AO.

7. The last issue relates to the computation of book profit u/s 115JB of the Act. The AO had added the amount of disallowance of amortization of premium and disallowance of depreciation to the net profit while computing book profit u/s 115JB of the Act. The Ld DRP directed the AO not to make these additions while computing book profit. It is the submission of the assessee that the AO did not implement the directions so given by Ld DRP. Accordingly, we direct the AO to comply with the directions given by Ld Dispute Resolution Panel on this issue.

8. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Pronounced in the open court on 15.2.2023.

Sd/-  
(PAVAN KUMAR GADALE)  
Judicial Member

Sd/-  
(B.R. BASAKARAN)  
Accountant Member

Mumbai; Dated : 15/02/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai

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