

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAHUL CHAUDHARY, JM

By Assessee
ITA No. 1842/MUM/2016
(Assessment Year 2006-07)

ITA No. 2539 /MUM/2014
(Assessment Year 2007-08)

ITA No. 7496/MUM/2012
(Assessment Year 2008-09)

ITA No 6318/MUM/2016
(AY 2009-10)

ITA No 2108/MUM/2016
(AY 2010-11)

ITA no 2586/MUM/2016
(AY 2011-12)

By AO
ITA No 2595/MUM/2018
AY 2010-11

ITA no 1911/MUM/2016
A Y 2011-12

Cabot India Ltd C/o. Kalyaniwalla & Mistry LLP 2 nd Floor, Esplanade House, 29, Hazarimal Somani Marg, Fort Mumbai-400 001	Vs.	DCIT-1(3)(2) Room No. 564, 5 th Floor, Aayakar Bhavan, M.K.Marg, Mumbai
(Appellant)		(Respondent)
DCIT-1(3)(2) Room No. 564, 5 th Floor,	vs	Cabot India Ltd C/o. Kalyaniwalla & Mistry LLP



Aayakar Bhavan, M.K.Marg, Mumbai		2 nd Floor, Esplanade House, 29, Hazarimal Somani Marg, Fort Mumbai-400 001
PAN No. AAACU1414F		

Assessee by : Mr. Percy J Pardiwala Sr Adv,
Mr. Jeet Kamdar, Adv
Revenue by : Ms. Samruddhi Hande, Sr.AR.

Date of hearing: 23-06-2023

Date of pronouncement : 21.08.2023

ORDER

PER BENCH

01. This is the bunch of 8 appeals in case of Cabot India Ltd (the assessee/appellant) for several years starting from assessment year 2006 – 07 to 2011 – 12 involving common issue of transfer pricing with respect to benchmarking of international transaction of Royalty expenditure and corporate taxes issues of cenvat credit, disallowance of carry forward of losses, depreciation and addition on account of non-reconciliation of ITS data. Both the parties submitted that with respect to the benchmarking of Royalty, the most appropriate method is required to be adjudicated and with respect to carry forward of losses and addition on account of non-reconciliation of ITS data only direction to the assessing officer is required. In view of this, both parties argued all the grounds together and therefore we decide these appeals by this consolidated order.



02. Assessment year 2006 – 07 is the lead year. The facts for assessment year 2006 – 07 show that assessee is formerly known as United Carbon India Ltd which was incorporated on 1 October 1962 engaged in the business of manufacture of carbon black. It is part of CABOT group which is the largest carbon black manufacturers in the world and is a technological leader in its field having headquartered in Massachusetts US and operation in 21 countries. Group holds 97.79% shares in Cabot India Ltd. Cabot India Ltd produces two grades of carbon black – carcass grade Carbon Black and trade grade Carbon Black. It pays royalty at the rate of 3% till assessment year 2005 – 06 on trade grade and 2% on carcass grade. During assessment year 2005 – 06 the rate of royalty payment were enhanced in carcass grade from 2% to 5%.
03. Assessee filed its return of income declaring loss of ₹ 90,023,388/- on 29/11/2006. Return of income was processed and accepted as it is, but selected for scrutiny by issue of notice under section 143 (2) of the act. As the assessee has entered into an international transaction with its associated concern on account of purchase of raw material, import and export of finished goods and on payment of royalty, reference was made to the learned transfer pricing officer for determination and computation of arm's-length price in relation to the international transaction as per form number 3CEB. The learned TPO passed an order under section 92CA (3) of the act on 29/10/2009 wherein he determined the arm's-length rate of royalty of carcass grade of product manufactured by the

assessee computed at the rate of 2% against the 5% of the sales computed by the assessee. The TPO made upward adjustment of ₹ 19,913,521/- two the arm's-length price of the international transaction. However there was no adjustment with respect to the royalty paid on trade grade product. Thus though in assessment year 2005 - 06 the rate of royalty payment in carcass grade carbon black was at the rate of 3% , however rate was increased by the AE to 5% on carcass grade products on the basis of agreement entered between the parties. It was observed by the learned transfer pricing officer that there is no change in the terms of the agreement governing the flow of technology and know-how since 1990, there is no new technology, therefore the increase of 3% royalty in case of carcass grade product is not justified. Thus the learned transfer pricing officer computed the arm's-length price of the royalty at the rate of 2% against the rate of 5% paid by the assessee. When the matter reached before the learned dispute resolution panel the action of the learned TPO determining the arm's-length price of the royalty at the rate of 2% instead of 5% was upheld. The assessee preferred an appeal before the coordinate bench in ITA number 8495/M/2010 which was decided on 19 December 2012. With respect to the royalty benchmarking coordinate bench dealt with the issue as per Para number 11 of its order. The coordinate bench considered that for assessment year 2005 - 06 the coordinate bench in assessee's own case as per order dated 31 May 2011 in ITA number 6622/ MUM/2009 and



CO number 170/M/2010 has set-aside the whole issue back to the file of the learned assessing officer for determining the most appropriate method. It is important to note down the finding of the coordinate bench for assessment year 2005 – 06 at Para number 11 (page number 13). In that assessment year also the royalty was paid at the rate of 5% of sales on carcass grade carbon black and 3% of sales on trade grade carbon black. The learned TPO made adjustment at the rate of 2% of sales on carcass grade carbon black. When the matter reached before the coordinate bench, it held that assessee is dealing into product manufactured by it being unique and the technology or technical input provided by Cabot incorporation USA are also unique, it is very difficult to find out the comparable case involving supply of similar technology or technical input so as to ascertain a comparable uncontrolled price paid for the royalty. Therefore the coordinate bench held that in absence of data available in the present case in respect of uncontrolled comparable transaction, the CUP method adopted by the assessee cannot be considered as a most appropriate method to determine the arm's-length price. Therefore for assessment year 2006 – 07 also the coordinate bench, despite objection by the learned authorized representative but pressed by the learned departmental representative, held that assessee has admitted certain additional evidences, apart from the agreement, there is no other material to show the actual payment of the royalty between the parties is at arm's-

length and therefore on the basis of additional evidences and the material available on record, and as held in assessment year 2005 -2006, the matter was set-aside to the file of the AO to determine the most appropriate method.

04. Pursuance to the order of ITAT, the learned TPO passed an order under section 92CA (3) of the act on 30/1/2015. According to the TPO the assessee was asked to produce the additional evidence and documentation with regard to the royalty payment to associated enterprise along with the proof of benchmarking. The assessee has produced information from the website of the secretary of industrial assistance wherein the royalty rates have been disclosed with regard to some of the companies in the industry. The learned TPO held that none of the royalty agreements were relating to the assessment year under consideration. All the royalty agreement stated by the assessee were pertaining to the year 2000 or prior to that. Further the royalty statistics are also related to different geographical area the learned TPO held that the search could have been accepted if the entities entered in the agreement were based either in India or in the USA which is comparable with the assessee and AE. Therefore, he refused to accept the benchmarking for determining the arm's-length price. Accordingly, the learned TPO held that in the original assessment proceedings the assessee explained that there is no technical difference between the two rates of carbon black , assessee has also furnished technical commentaries which confirmed that there is no technical

difference between trade grade carbon black and carcass grade carbon black. The only difference is in the particle size and the ultimate usage either at the bottom of a tyre or in the sidewall. Therefore, he considered both the grades similar and accordingly held the arm's-length price of the royalty on carcass grade at the rate of 3% like trade grade. Accordingly adjustment was made amounting to ₹ 13,275,681. Consequently order giving effect under section 254 of the act was passed on 6/2/2015.

05. The assessee preferred an appeal before the learned CIT – A submitting that assessee has justified the benchmarking by adopting CUP method as the most appropriate method stating that rates at which royalty was paid by other group companies of Cabot group to Cabot Corporation are also in the similar range. The Reserve Bank of India has laid down guidelines which prescribed that royalty at the rate of 5% can be paid. Further the Secretariat For Industrial Assistance [SIA] disclosed the royalty rates approved by it for various companies in India for each industry wherein the rates are in the range of 3% to 8% and accordingly, the royalty paid at the rate of 5% on carcass grade carbon black to the associated enterprise is at arm's-length. The assessee further challenged that the learned AO rejected the secretary of industrial assistance royalty rates stating that they relate to year 2000 or prior to that, however those rates are pertaining for 5 years. With respect to the geography, it was stated that the royalty payer is always an Indian company. Therefore it was submitted that AO has taken the benchmarking of royalty by adopting

internal cup at the rate of 3% with respect to the trade grade carbon black Royalty rates, is not acceptable benchmarking methodology. The learned CIT – A passed an appellate order on 30/11/2015 holding that the learned transfer pricing officer was fully justified in determination by adopting and applying the comparable rate of royalty payment of 3% of trade grade of carbon black to carcass grade of carbon black when the rate of royalty payment was available for a similar type of carbon black with the assessee on product manufactured by assessee itself. Accordingly he dismissed the appeal on this issue.

06. Therefore, assessee is in appeal before us against the appellate order in ITA number 1842/M/2016 for assessment year 2006 – 07 raising following grounds of appeal: –

ITA No. 1842/MUM/2016

(Assessment Year 2006-07)

"1. Both the lower authorities erred in making a Transfer Pricing adjustment restricting royalty allowable on Carcass Grade Carbon Black to 3%.

2. Both the lower authorities erred in confirming the disallowance without any material, information or documents in their possession in contravention of Section 92C(3).

3. Both the lower authorities erred in ignoring the material led by the appellant including an independent search on an external database.

4. *Both the lower authorities failed to consider the directions issued by Reserve Bank of India from time to time read together with Press Note 9 (2000 series) dated 8th September, 2000 issued by Government of India.*

6. *The learned Commissioner of India Tax (Appeals) erred in relying in conjecture in order to decide the issue against the appellant.*

7. *Having regard to the facts and circumstances of the case and the provisions of law, the appellant submits that the Assessing Officer/Transfer Pricing Officer be directed to allow royalty payable on Carcass Grade Carbon Black @5% as claimed in the Return of Income."*

07. Therefore in the appeal of the assessee the only challenge is with respect to determination of the arm's-length price with respect to royalty paid by the assessee on carcass trade carbon black.

08. The learned authorized representative

i. Referred to the order of the coordinate bench dated 19 December 2012 wherein the matter was remitted back to the TPO for determining the arm's-length price using the most appropriate method.

ii. referred to its letter dated 15 January 2015 wherein the assessee adopted CUP method by conducting search on royalty source database

for companies in petrochemical industry wherein the royalty rates ranged between 3% to 30%. The assessee also submitted the rates of the secretary of industrial assistant website wherein the royalty rates ranged between 3% to 8% and further compared the royalty paid by the group companies where there is no management or control.

- iii. assessee also benchmarked the transaction using the TRANSACTIONAL NET MARGIN METHOD also as the alternative benchmarking methodology by comparing its profit margin with its competitor Phillips Carbon after making certain adjustments.
- iv. The learned transfer pricing officer rejecting all the contentions of the assessee held that 3% royalty was already allowed on trade grade carbon black and the same rate be applied for carcass grade rate thereby restricting the disallowance to 2% on carcass grade.
- v. Learned CIT – A confirmed the same.
- vi. The learned authorized representative stated that benchmarking methodology adopted by the assessee applying CUP method is the most appropriate method is correct in all respect.
- vii. Alternatively it was stated that the 'other method' may be allowed to be benchmarked



and for other method the SIA and RBI circular rates may be adopted as the comparable rate for benchmarking royalty transaction.

- viii. He referred to the decision of the honourable Bombay High Court in case of CIT versus SGS India private limited dated 18 November 2015, press note number 9 of Department of Industrial Policy And Promotion issued by Ministry Of Commerce And Industry dated 8 September 2000 and further the reserve bank of India circular dated 21 July 2003 on royalty payments and 24 February 2004 on the same issue wherein the royalty payments of 5% of the local sales and 8% on export sales is allowed.
- ix. The learned authorized representative also placed reliance on the decision of the coordinate bench in case of 126 taxmann.com 240 in case of Dow aggroscience India private limited versus ACIT and ACIT versus DowAgroscience India private limited [ITA number 8385/M/2011 dated 20 September 2016.]
- x. He further relied upon the decision of the coordinate bench in case of Cararo India private limited versus DCIT 104 taxmann.com 166.

xi. Accordingly it was submitted that the benchmarking methodology has been correctly determined by the assessee by adopting the CUP method and alternatively, the 'other method' can be considered as the most appropriate method and the benchmarking made by the assessee based on that shows that the international transaction of royalty payment of carcass trade grade carbon black of the assessee is at arm's-length price.

09. The learned departmental representative vehemently submitted that

- a. assessee is paying royalty on two products. There is no difference between both these products.
- b. Assessee has not submitted anything which even remotely suggest that the technology with respect to both the products are different.
- c. Earlier assessee was paying Royalty @ 2 % now by amending agreement it has increased it to 5 %. There is no change in FAR . Therefore even otherwise the increase is unjustified.
- d. For one product i.e. trade grade product assessee is paying 3% royalty and for carcass grade product assessee is paying 5% royalty. Therefore, internal CUP is available. The learned TPO is correct in adopting the CUP method and adopting the comparable price of 3% royalty on trade grade

products. Thus, the argument of the learned DR was that CUP is the most appropriate method in this case where internal CUP comparable data is available.

- e. With respect to the other method it was submitted that for the impugned assessment year same is not applicable.
- f. Further the RBI rates and SIA rates cannot be considered appropriate for benchmarking of the royalty. He submitted that transfer pricing provisions are Anti avoidance provision and they cannot be compared with the RBI rates and SIA rates.
- g. Further there is no FAR available of RBI rates or SIA rates, therefore how those are comparable is not demonstrated.
- h. Even in the "other method" the benchmarking based on RBI rate or SIA rates cannot be made as those are coupled with several other conditions and consideration which are not shown to be existing similarly in case of the assessee.
- i. With respect to the decision of Dow Agrosience India private limited the learned DR submitted that it is not the case of the 'other method' , further the CUP method deals with the actual price charged in comparable circumstances. Further for assessment year 2004 – 05 in that case it clearly shows that in assessee's own case the SIA and the reserve bank of India has approved the rates of royalty. Those



rates are not in the case of somebody else but in the case of that assessee. Assessee in that case adopted the comparable uncontrolled price method and the comparable was taken by benchmarking the RBI rate and SIA rates. Similar facts are not available in the case of this assessee.

- j. In cup method actual transaction is required to be considered. In the case of the assessee internal cup is available which cannot be discarded. Therefore the decision relied upon by the learned authorized representative does not apply to the facts of the case.

010. The learned authorized representative reiterated the submissions earlier made.

011. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also considered the decision of the coordinate bench in assessee's own case wherein it remanded the issue back to the file of the learned assessing officer to redetermine the arm's-length price of the international transaction by first determining the most appropriate method. When we look at the order of the coordinate bench for assessment year 2005 -06 of coordinate bench wherein at Para number 10 it has categorically held that the royalty rates paid by the assessee to its associated enterprise itself cannot be taken for benchmarking of the other transaction with its associated enterprises for the reason that both the transactions are controlled transactions. The learned TPO



has taken the benchmarking rate of royalty paid by the assessee to its associated enterprise of trade grade carbon black (3%) with royalty payment for carcass grade at the rate of 5%. Probably the learned TPO has considered it as internal CUP available. However, both the transactions are controlled transactions as those are with its associated enterprises. Therefore the comparison made by the learned TPO and the learned CIT – A are completely incorrect. However, we hasten to add that though internal CUP does not apply, however we do not agree that for benchmarking this royalty transaction of carcass grade royalty payment at the rate of 5% CUP cannot be adopted as the most appropriate method for determining the ALP. Assessee argued before the coordinate bench for earlier years that the product manufactured by the assessee being unique and the technology or technical input provided by Cabot Corporation USA also being unique, it is very difficult to find out a case involving supply of similar technology or technical input so as to ascertain a comparable uncontrolled price paid for the royalty. The assessee also argued that no data available for that year in respect of uncontrolled comparable transactions which have a similarity or at least a close similarity with the transaction of the assessee with its associated enterprise involving payment of royalty. For these reasons, the coordinate bench held for that year that the CUP method adopted by the assessee cannot be considered as the most appropriate method to determine arm's-length price. Therefore on the facts of the case and

arguments by the parties the coordinate bench for that year It held that CUP method cannot be regarded as the most appropriate method for determining the arm's-length price of the royalty paid by the assessee as there is no data available in respect of uncontrolled transactions which are similar or at least closely similar to the transaction of the assessee company with its associated enterprise. In the circumstances the coordinate bench set-aside the issue back to the file of the learned assessing officer to determine the most appropriate method first for benchmarking of this transaction. However for the current year, the assessee as per letter dated 15 January 2015 before the Additional Commissioner Of Income Tax [THE TPO] in the proceedings set-aside by the coordinate bench back to the file of the learned assessing officer for determining the most appropriate method, assessee once again claimed that CUP is the most appropriate method for benchmarking. The assessee also cited the instances of the rates at which royalty was paid by other group companies of Cabot Corporation to it. It was stated that the rates are ranging between 6% to 10%. However we failed to understand that how the transaction of cabot Corporation with other group companies of the Cabot could be considered as a comparable transaction because both the transactions are in controlled environment. The RBI rate stated by the assessee cannot also be considered because these are not the transactions but the rates thought appropriate by the reserve bank of india on the basis of roles and responsibilities of that Institute. It has

nothing to do with the transfer pricing mechanism as per The Income Tax Act. Same is the fate of the rates shown by SIA by Ministry of commerce and industry. Further the SIA rates shown by the assessee in paragraph number 10 of its letter dated 15 January 2015 before the learned TPO clearly shows that this was the foreign collaboration proposals. The collaboration proposals are also coupled with several other conditions and commercial aspects which may or may not be present in the present agreement of assessee with AE as neither the assessee nor the AO is privy to that information. Therefore, reliance on the rates adopted by the RBI and SIA both are rejected and cannot be taken for benchmarking the transaction by adopting cup method. The assessee has benchmarked the royalty rates on intellectual property database royalty source.com. Wherein the assessee has narrowed down search to only 'carbon black' segment of industry. This is unfair and not justified. Each transaction of royalty is unique, if it is not so, who will pay royalty for a common technology. Therefore the assessee widen the search to include all companies in the petrochemical industry which gave a list of 11 companies as stated by the assessee. However before us, no such details were produced. Annexure L stated in the letter has not been submitted before us. Assessee also did not show that what is the ballpark rates of royalty in those 11 comparables and why the same should not be used.

012. The assessee has also used the transactional net margin method as the most appropriate method. However we do

not have any reasoning from either side that why the transactional net margin method is the most appropriate method for benchmarking royalty transaction. Further assessee has selected only one comparable i.e. Phillips Carbon Ltd, made a lot of adjustments to the margin of the comparable. Assessee has also categorically held that the capacity of the comparable is five times more than the capacity of the assessee. The comparable company is having huge profit whereas the assessee is having the huge losses because of the captive power plant generating power with the comparable. The age of the plant of the assessee and the age of the plant of the comparable was also distinguished. Ultimately the assessee itself stated that that comparable is not a good comparable because of Many reasons. Therefore in the words of the assessee itself the transactional net margin method fails. Therefore the benchmarking conducted by the assessee is a futile exercise and cannot be given any credence. In view of this, the transactional net margin method pleaded before the learned assessing officer/transfer pricing officer is correctly rejected.

013. On careful consideration of all the arguments and submission made by the both the parties as well as the orders of the coordinate bench, We are of the view that for benchmarking the royalty transaction the database of royalty source is correctly used by the assessee but the comparables are not shown before us. While adopting the most appropriate method in case of such transaction, the factors such as the nature of the relevant intangibles,

difficulty of identifying comparable uncontrolled transaction and intangibles and further difficulty of applying certain transfer pricing methods should be of paramount importance. However for determining the most appropriate method it should be based on the functional analysis of how the assessee uses 'the right to use' technology for its operation for which Royalty is paid. Of course, the assessee has every right to use either the transactional base methods or income based methods for benchmarking the above transaction but the assessee has not benchmarked by adopting any of the methods and wherever it benchmarked it itself contradicted the benchmarking methodology. If the comparability analysis is based on the database, CUP method is the most appropriate method for benchmarking the royalty transactions, if income based approach cannot be adopted. Assessee has not shown any evidence of benchmarking by adopting the income based approach and therefore we hold that the CUP method is the most appropriate method. Assessee has used Royalty sources database that is required to be used or it may use any other royalty database, the assessee should make a search of the comparable royalty agreements with respect to the timing, tenure, geographical location of the parties, relevant terms and conditions of the agreement, justification for increasing it by 2% and consequent increase in the functional liability of the recipient party etc. and submit before the learned transfer pricing officer for examining the arm's-length price. The first onus lies on

the assessee to submit that the international transactions of the payment of royalty at the rate of 5% on carcass grade carbon black is arm's-length. Accordingly, we set-aside all the grounds of appeal of the assessee with respect to the benchmarking of international transaction back to the file of the learned assessing officer where the assessee would be benchmarking the transaction by adopting the cup method as held above. The learned AO/TPO may examine the benchmarking and decide the issue afresh. In the result, ground number 1 – 7 of the appeal for assessment year 2006 – 07 are allowed with above directions.

014. Appeal of the assessee for assessment year 2006 – 07 is allowed for statistical purposes.
015. ITA number 2539/M/2014 for assessment year 2007 – 08 is filed by the assessee wherein the adjustment with respect to the arm's-length price of the royalty payment to its associated enterprise of carcass grade carbon black was made by proposing an adjustment of ₹ 24,540,961. The facts and circumstances of the case for assessment year 2007 – 08 are identical to the facts and circumstances of the case for assessment year 2006 – 07. As we have decided the appeal of assessee for that year, with similar directions we set-aside this appeal also back to the file of the learned TPO.
016. In the result ITA number 2539/M/2014 filed by the assessee for assessment year 2007 – 08 is allowed for statistical purposes.



017. ITA number 7496/M/2012 is filed by the assessee for assessment year 2008 – 09 wherein the transfer pricing adjustment of ₹ 80,104,743/- was made by the learned transfer pricing officer holding that the arm's-length price of the royalty incurred is Rs nil. In the present case the assessee paid royalty to its associated concern on trade grade carbon black at the rate of 3% of sales and on carcass grade carbon black at the rate of 5% on sales. The learned transfer pricing officer determine the arm's-length price of both the royalty at Rs. Nil as relevant documents were not furnished before the learned TPO. Further it was the claim of the learned transfer pricing officer that royalty payments are treated at arm's-length only when it is proved substantially by the taxpayer that such intangibles were actually used and further have benefited to the assessee. The learned dispute resolution panel while giving direction under section 144C (5) of the income tax act dated 7/9/2012 has held that the royalty payments are required to be benchmarked by adopting CUP method, the learned t TPO has correctly held the arm's-length price of the royalty is at Rs Nil as the assessee has failed to show by proper documentation the benchmarking analysis. As for the similar reasons, with respect to the carcass grade carbon black royalty paid at the rate of 5%, we have set-aside the issue back to the file of the learned TPO/AO with direction to the assessee to benchmarked the above transaction by adopting the most appropriate method as CUP for establishing that those transactions are at arm's-length price for AY 2006-07 and 2007-08, with similar

direction, for this year also, for Royalty payments for both grades of carbon black, where the learned TPO has challenged also with respect to the absence of any new technology for increase in the royalty rates, we set-aside this issue to the learned TPO, directing assessee to establish by the contemporaneous documents that the international transaction is at arm's-length of royalty payment. Ld TPO may examine the same and determine the arm's-length price. Accordingly ground number 5, 6 and 7 of the appeal are allowed with above direction.

018. With respect to the ground number 1 of unutilized cenvat credit against addition under section 145A of ₹ 25,397,539, it is the claim of the assessee that this issue is covered in favour of the assessee by the order of the coordinate bench in assessee's own case for assessment year 2001 – 02, 2002 – 03 and also confirmed by the honourable Bombay High Court for assessment year 2002 – 03. Further, the learned AO himself has accepted the same in subsequent year.
019. The learned departmental representative did not challenge the same.
020. Accordingly we direct the learned assessing officer to delete the addition made by invoking provisions of section 145A of ₹ 25,397,539/-. Accordingly ground number 1 – 4 of the appeal are allowed.
021. Ground number 8 is with respect to allowance of brought forward losses from earlier years. The assessee stated that

it has carried forward loss available of ₹ 111,231,608/- where the learned AO has allowed the set off only to the extent of ₹ 77,273,618. Further the assessee has pleaded before us by way of an additional ground of appeal that the learned assessing officer has not allowed the carry forward of losses and unabsorbed depreciation for which assessee is eligible.

022. After hearing the parties, we set-aside the issue back to the file of the learned assessing officer with a direction to assessee to submit before the learned assessing officer the chart of allowability of carry forward of depreciation and business losses, the learned AO may examine the same and if it is found in accordance with the law, grant same. Accordingly ground number 8 and additional ground of appeal are allowed with above direction.
023. In the result ITA number 7496/M/2012 filed by the assessee for assessment year 2008 – 09 is partly allowed.
024. ITA number 6318/M/2014 is filed by the assessee for assessment year 2009 – 10 wherein the assessee has challenged the order of The Commissioner Of Income Tax Appeals – 15 Mumbai dated 30/7/2014.
025. Ground number 1 – 3 of the appeal is with respect to the adjustment under section 145A ₹ 37,766,689/-. Both the parties confirmed that this is identical to ground number 1 – 3 of the appeal of the assessee for assessment year 2008 – 09. The learned departmental representative could not show us any reason to uphold the above addition. As

we already directed the learned assessing officer to delete the addition for assessment year 2008 – 09, similarly we also direct the learned assessing officer to delete the above addition for this assessment year also. Accordingly ground number 1 – 3 of the appeal are allowed.

026. Ground number 7 – 11 of the appeal are against the determination of the arm's-length price of the royalty expenditure at Rs Nil whereas the assessee has paid a sum of ₹ 84,779,185/-.
027. Both the parties confirmed that for this year also the learned transfer pricing officer has determined the arm's-length price of the royalty expenditure at Rs Nil holding that there is no new technology, the direct benefit was not demonstrated and the royalty payments are therefore not justified.
028. Identical issue arose in case of the assessee for assessment year 2008 – 09 wherein we have set-aside the issue back to the file of the learned assessing officer/transfer pricing officer with a direction to the assessee to benchmark the royalty transaction and demonstrate before the lower authorities that it is carried out at arm's-length. With similar direction we also set-aside these grounds of appeal for assessment year 2009 – 10 to the file of the learned TPO/AO. In the result these grounds are allowed for statistical purposes.
029. No other grounds are pressed for assessment year 2009 – 10 and therefore the appeal of the assessee for

assessment year 2009 – 10 in ITA number 6318/M/2014 is partly allowed.

030. For assessment year 2010 – 11 the assessee has filed appeal in ITA number 2108/M/2016 and the learned assessing officer has filed appeal in ITA number 2595/M/2016 against the appellate order passed by the Commissioner Of Income Tax (Appeals) – 55, Mumbai dated 30/11/2015.

031. In assessee's appeal in ITA number 2108/M/2016 the assessee has raised all the grounds of appeal starting from 1 – 9 against the benchmarking of the international transaction of the payment of royalty. The assessee has made a royalty payment of ₹ 98,745,449/- the learned transfer pricing officer has determined the arm's-length price of the royalty at Rs. Nil. The reasons given are similar as in assessment year 2008 – 09. The learned CIT – A has determined the arm's-length price of the royalty payment at the rate of 3% in case of carcass grade carbon black and also in case of trade grade carbon black at the same rate. Thus the learned CIT – A has restricted the arm's-length price adjustment on carcass grade carbon black royalty payment by 2% as held in earlier years. The Id AO is also in appeal against that appellate order.

032. We have already set-aside the issue back to the file of the learned assessing officer for the earlier years with respect to the benchmarking of the royalty transaction, where the assessee is directed to first benchmark Royalty payments by adopting CUP as the Most appropriate method and then

show that international transactions are carried out at arm's length price . With similar direction, we set-aside appeal of the assessee back to the file of the learned AO/TPO with a direction to the assessee to benchmark the international transaction of the payment of royalty to demonstrate that it is carried out at arm's-length price. The learned AO/TPO may examine the same and determine ALP in accordance with the law. Thus Ground no. 1 to 9 are allowed with above direction.

033. In the result ITA number 2108/M/2016 filed by the assessee is allowed for statistical purposes.

034. ITA number 2595/M/2016 is filed by the learned assessing officer for assessment year 2010 – 11 wherein the solitary ground is with respect to the direction of the learned CIT – A who has accepted that the royalty payment made by the assessee with respect to the carcass grade carbon black and trade grade carbon black at the rate of 3% is at arm's length. He confirmed the adjustment of 2% with respect to the carcass grade carbon black royalty payment. Therefore the learned that AO is in appeal before us against the relief granted by the learned CIT – A.

035. As we have set-aside the appeal of the assessee to the file of the learned transfer pricing officer wherein similar grounds of benchmarking of the royalty transactions are involved, the grounds of appeal filed by the learned assessing officer are also restored back to the file of the learned AO/TPO. Accordingly the appeal filed by the

learned assessing officer is also allowed with above directions.

036. In the result appeal filed by the learned assessing officer in ITA number 2595/M/2016 for assessment year 2010 – 11 is allowed for statistical purposes.

037. ITA 2586/M/2016 is filed by the assessee and ITA number 1911/M/2016 is filed by the learned assessing officer for the assessment year 2011 – 12 against the assessment order passed by the learned assessing officer under section 143 (3) read with section 144C (13) of the act dated 29/1/2016 against the returned income filed by the assessee on 25/11/2011 at a loss of ₹ 312,278,296 is assessed at loss of ₹ 284,077,536.

038. The appeal of the assessing officer is against the direction of the learned Dispute Resolution Panel of deleting the addition of ₹ 77,043,394/- on account of depreciation on retired assets.

039. The appeal of the assessee is with respect to the assessment order wherein the arm's-length price of the royalty payment made by the assessee of ₹ 28,200,762/- is considered at Rs Nil. The assessee is also aggrieved with the partial grant of credit for carry forward of losses.

040. We find that with respect to the royalty the issue involved is identical to the issue involved in the appeal of the assessee for assessment year 2008 – 09. We have set-aside that appeal of the assessee back to the file of the learned assessing officer with specific direction, we also for

similar reasons and direction set-aside the appeal of the assessee to the file of the learned assessing officer to examine the arm's-length price of the royalty transaction.

041. With respect to the carry forward of losses, we direct the learned assessing officer to grant assessee the correct amount of carry forward losses after examining the necessary detail submitted by assessee. In the result ground number 1 – 9 of the appeal of the assessee are allowed with the direction and ground number 10 and 11 of the appeal are allowed.

042. In the result ITA number 2586/M/2016 filed by the assessee is allowed for statistical purposes.

043. Coming to the appeal of the learned assessing officer in ITA number 1911/M/2016 , we find that during the course of the assessment proceedings the learned assessing officer noted that schedule 5 of the profit and loss account relating to the claim of depreciation on fixed assets viz that the assessee company has reduced ₹ 157 crores from different block of assets. Further note number 2 of the said schedule reads the assets aggregating to ₹ 147 crores have been retired from active use and are held for sale. Further the depreciation chart furnished by the assessee along with the tax audit report was also perused. The AO was of the view that there is a difference in the deletion of the assets as per accounts and as per the tax audit report. Therefore, he examined the claim of the depreciation made by the assessee of ₹ 77,043,394. The learned assessing officer noted that though the assessee company

owning the assets as they are not sold out, but these not used for the business purposes as is evident from the facts that those assets are not fit to use as the assessee has already discarded the same. Ld AO held that Once the assets are not used for the purposes of the business, depreciation on the same is not allowable. Accordingly he disallowed depreciation of ₹ 77,043,394.

044. Against which the assessee preferred an objection before the learned Dispute Resolution Panel. The learned DRP following the decision of the honourable jurisdictional Bombay High Court in case of Sonic Biochem And Extractions Private Limited, allowed the claim of the assessee. Accordingly, following the direction of the learned Dispute Resolution Panel, disallowance of depreciation was deleted but the learned assessing officer is in appeal before us.

045. After hearing the parties, we find that the learned dispute resolution panel has followed the decision of the honourable Bombay High Court. The learned departmental representative could not show us any reason that why the decision of the honourable Bombay High Court is not applicable in the facts of the case. In view of this, we do not find any infirmity in the direction of the learned dispute resolution panel and dismiss the solitary ground of appeal.

046. In the result ITA number 1911/M/2016 filed by the learned assessing officer for assessment year 2011 – 12 is dismissed.



047. Accordingly all the eight appeals pertaining to the assessee are disposed of as above.

Order pronounced in the open court on 21.08.2023.

Sd/-
(RAHUL CHAUDHARY)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 21.08.2023

Sudip Sarkar, Sr.PS

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.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai