IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH, AHMEDABAD

BEFORE Ms. SUCHITRA KAMBLE, JUDICIAL MEMBER AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

ITA No.595/Ahd/2017
Assessment Year: 2010-11

Skaps Industries India Pvt. Ltd., A-20, Survey No.423, Nr. Nutan Nagrik Bank, Mahagujarat Industrial Estate, Moraiya, Sanand, Ahmedabad - 382 210. **[PAN – AADCP 2779 D]**	Vs.	The Dy. Commissioner of Income Tax, Circle – 8, Ahmedabad.
(Appellant)		(Respondent)

Assessee by	Shri S.N. Soparkar, Sr. Advocate & Shri Parin Shah, ARs.
Revenue by	Shri Prateek Sharma, Sr. DR

Date of Hearing	04.03.2024
Date of Pronouncement	08.05.2024

O R D E R

PER SUCHITRA KAMBLE, JUDICIAL MEMBER:

This appeal is filed by the assessee against order dated 05.12.2016 passed by the CIT(A)-7, Ahmedabad for the Assessment Year 2010-11.

2. The assessee has raised the following grounds of appeal :-

"1. Ld. CIT (A) erred in law and on facts in confirming disallowance u/s. 35D of Rs.59,38,487/- (being 1/5th of Rs.2,96,92,435/-). Ld. CIT(A) ought to have considered the fact that out of total expenses of Rs.2,96,92,435/-, Rs.16,55,644/- (1/5th of Rs.82,78,218/-) is eligible u/s.35D(2) of the Act and ought to have allowed capitalization for balance Rs.2,14,14,000/- (Rs. 2,96,92,435.00 - Rs.82,78,218.00). It be so held now.

2. Ld. CIT (A) erred in law and on facts in confirming disallowance of employees' contribution to provident fund of Rs.14,448/- u/s.43B of the Act.

3. Ld. CIT (A) erred in law and on facts in confirming addition of Rs.2,42,26,184/- made by Ld. TPO u/s.92CA(3) of the Act by affirming TPO's action of rejecting most appropriate method (MAM) adopted by the appellant ignoring submissions of the appellant.

4. Ld. CIT (A) erred in holding that TPO has rightly rejected CUP method for benchmarking purchase transaction by considering it as incorrect method ignoring fact that TPO himself has accepted CUP as MAM for same set of transaction carried with AE in preceding years.

5. Ld. CIT (A) erred in law in holding that TPO has rightly rejected the CPM (Cost Plus Method) for benchmarking sale transaction by considering it as incorrect method ignoring fact that appellant being manufacturer has entered into specific long-term selling contracts with AE and by following CPM a higher profit margin earned by the appellant as compared to most appropriate comparable companies.

6. Ld. CIT (A) ought to have considered the fact that TPO himself has accepted CPM as MAM for same set of transaction carried out with AE in preceding year as well as subsequent year and accordingly ought to have accepted CPM on principle of consistency.

7. Ld. CIT (A) erred in law and on facts in confirming action of TPO in adopting TNMM as MAM for purchase and sale both transaction carried with AB.

8. Ld. CIT(A) ought to have appreciated submission of appellant that if TNMM is accepted then OP/OC - Profit margin indicator ratio needs to be compared at entity level

9. Ld. CIT (A) ought to have considered submission that if TNMM is considered as MAM and applied at entity level then average margin falls within +/- 5% price band provided in Section 92C of the Aet and accordingly there is no question of additions in ALP of international transaction.

10. Both lower authorities ought to have allowed deduction u/s.10B of the Act after adjustment of addition/disallowance made as per CBDT Circular No.37 of 2016.

11. Appellant craves leave to add, alter, amend or delete any of the above grounds at the time of hearing of this appeal."

3. The return of income was filed by the assessee on 29.09.2010 declaring total income of (-) Rs.2,12,79,622/-. The assessee company is engaged in the business of manufacturing of Slit Tape Woven Fabrics and Trading of Nonwoven

Fabrics. The case was selected for scrutiny by issuing notice under Section 143(2) of the Income Tax Act, 1961 on 26.08.2011 which was duly served on the assessee. Thereafter, notices under Section 142(1) of the Act were issued on 21.08.2012 and 19.04.2013 which was responded by the assessee from time to time and filed various details. The Assessing Officer observed that the assessee made claim of deduction of Rs.2,25,24,286/- under Section 10B of the Act. The said claim of deduction was in respect of 'other income' consisting of exchange rate fluctuation gain of Rs.30,06,069/ and interest of Rs.2,32,952/-. After taking cognisance of assessee's reply, the Assessing Officer disallowed excess claim of deduction under Section 10B of the Act amounting to Rs.34,12,104/-. As regards to adjustments in International Transactions under Section 92 of the Act, the Transfer Pricing Officer (TPO) made upward adjustment of Rs.2,42,26,184/- and added the same to the total income of the assessee. The Assessing Officer also made disallowance of Rs.2,94,465/- under Section 14A read with Rule 8D. The Assessing Officer also disallowed Rs.59,38,487/- in respect of preliminary pre-operative expenditure written off. The Assessing Officer also added Rs.14,448/ towards employees' contribution to Provident Fund which was deposited after statutory due date. The Assessing Officer added the provision for deferred tax in respect of adjustment in book profit amounting to Rs.49,182/-.

4. Being aggrieved by the Assessment Order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. As regards to ground no.2, the Ld. AR submitted that in the light of decision of Hon'ble Apex Court in the case of Checkmate Services (P.) Ltd. vs. CIT-1 (2022) 448 ITR 518, the said ground is against the assessee. Hence, ground no.2 is dismissed.

6. As regards to ground no.1 related to total expenses of Rs.2,96,92,435/- out of which Rs.16,55,644/- (1/5th of Rs.82,78,218/-) which is eligible under Section 35D(2) of Act should have been allowed as capitalisation for balance of Rs.2,14,14,000/-, the Ld. AR submitted that the CIT(A) has not at all considered the alternative plea of the assessee while deciding the issue/ground and in fact

has given his dismissal for which the Ld. AR requested that the matter may be remanded back to the file of the CIT(A) for proper adjudication of the issues.

7. The Ld. DR submitted that the CIT(A) has concurred the view of the Transfer Pricing Officer/Assessing Officer and, therefore, there is no need to give separate finding to that extent.

8. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that in fact while deciding this issue, the CIT(A) has not given any independent finding and in fact has not considered or adjudicated the assessee's alternative plea. Therefore, it is appropriate to remand back this entire issue to the file of the CIT(A) for proper adjudication of the same in consonance with the assessee's plea before the CIT(A) and the issue be decided as per the Income Tax Statute. Needless to say, the assessee be given opportunity of hearing by following the principles of natural justice. Ground no.1 is partly allowed for statistical purpose.

9. As regards to ground nos.3 to 10, the Ld. AR submitted that the CIT(A) was not right in confirming addition of Rs.2,42,26,184/- made by the Transfer Pricing Officer (TPO) under Section 92CA(3) of the Act by affirming TPO's action of rejecting most appropriate method (MAM) adopted by the assessee while totally ignoring the submissions of the assessee. The Ld. AR submitted that the rejection of CUP method for benchmarking purchase transaction was not justified on the part of the TPO as the TPO himself has accepted CUP as most appropriate method for the same set of transactions carried with the Associated Enterprise (AE) in preceding years. The Ld. AR further submitted that the assessee being manufacturer has entered into specific long-term selling contracts with AE and by following CPM a higher profit margin earned by the assessee as compared to most appropriate comparable companies. In fact, the TPO himself has accepted CPM as the most appropriate method for same set of transactions carried out with AE in preceding year as well as subsequent year and accordingly should have accepted the CPM on principle of consistency in benchmarking. The Ld. AR further submitted that if TNMM is accepted, then OP/OC profit margin indicator

ratio needs to be compared at entity level and in fact comparable which was taken by the TPO are having less than average 20% of profit ratio in respect of export while the assessee company is 100% export-oriented company. The Ld. AR further submitted that if TNMM is considered as most appropriate method and applied at entity level, then average Margin falls within +/- 5% price band provided in Section 92C of the Act and accordingly there is no question of additions in ALP of International Transaction.

10. The Ld. DR submitted that the Assessing Officer/Transfer Pricing Officer has rightly held that the cost-plus method is sensitive to differences in accounting practices and, therefore, any difference in accounting practice such as treatment of commission and discounts as reduction in sale price or a separate head of expenditure would affect the calculation of gross profit margins. Therefore, the gross profit margins for the comparables are not readily available and also could not be readily worked out. Therefore, the Ld. DR submitted that the TPO has rightly rejected the cost-plus method. The Ld. DR further submitted that regarding incorrect computation by taking into account gross profit margin is 20% in the show cause notice and the same was rightly discussed and decided by the TPO. The Ld. DR further submitted that the CIT(A) has in fact given categorical finding that the method adopted by the TPO was just and proper as the assessee though claimed has not carried out any adjustments on account of bulk quantity discount and customs duties, the purchase price paid to AE was still lower as that paid to unrelated party. Since the factors of comparability that are required to be examined for determining a comparable uncontrolled transaction are specifically provided in the Income Tax Rules and such adjustments have admittedly not been carried out by the assessee, therefore, the CIT(A) has rightly concurred the view of the TPO in respect of rejecting the CPM method.

11. We have heard both the parties and perused all the relevant material available on record. From the perusal of records, it is seen that the assessee had two units in respect of Moraiya Ahmedabad and Mundra. In respect of Cost Plus Method used in services of sale of Woven Geo Textiles, as both units of the assessee has used the same method but the Assessing Officer/Transfer Pricing

Officer has chosen only Moraiya Ahmedabad Unit and rejected the Cost Plus Method. The CIT(A) has totally failed to take into account profit margins as well as how the comparables which were selected by the TPO are not as per the filters given by the TPO himself. The product is manufactured by the assessee as per the specification and quality needed by the AE for which necessary technical assistance for setting up, commissioning and running of plants and training of the Indian Technicians was provided by the AE. In fact, all the functions of manufacturing are performed by the assessee according to the needs of the AE and in case the AE is unable to purchase the product, the AE will be liable to pay the entire amount equivalent to interest and instalment to the Bankers of the assessee. The risk factor was upon the AE and, therefore, the assessee while calculating the gross profit margin of the comparable has taken into consideration only the cost incurred in manufacturing process. All these aspects including that of adjustments and other comparables in respect of actual rate of cost along with capacity utilisation adjustment were much below to that of assessee's units. The TPO has not looked into these aspects along with the appropriate method taking into consideration the assessee's manufacturing activities and its sale transactions. The assessee is 100% export unit (98%). Thus, the TPO as well as the CIT(A), both the Authorities have failed to take cognisance of the same and was not right in rejecting the contentions of the assessee. Therefore, the TPO is directed to look into the same. Matter is remanded back to the file of the TPO for proper adjudication. Needless to say, the assessee be given opportunity of hearing by following the principles of natural justice. Ground nos.3 to 10 are partly allowed for statistical purpose.

12. In the result, appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the open Court on this 8th May, 2024.

Sd/-
(WASEEM AHMED)
Accountant Member

Sd/-
(SUCHITRA KAMBLE)
Judicial Member

Ahmedabad, the 8th May, 2024

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Copies to: *(1)* *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad