

IN THE INCOME TAX APPELLATE TRIBUNAL

"K" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND

SHRI SANDEEP GOSAIN, JUDICIAL MEMBER

ITA no.1555/Mum./2012
(Assessment Year :2007-2009)

BASF Coatings (India) P.Ltd
(Since Merged with Basf India Ltd.)
Vibgyor tower, Unit No.1, 1st Floor,
Plot No.C-62, G Block Bandra Kurla
Complex, Mumbai 400051
PAN AAACB4599E

..... Appellant

v/s

ACIT CIT CIR 6(1)
Aayakar Bhavan, M.K Road
Mumbai 400 020

..... Respondent

Assessee by : Shri. P. Pardiwala
Revenue by : Ms. Heena Sheth

Date of Hearing 17.04.2017

Date of Order – 28.04.2017

ORDER

PER: SHAMIM YAHYA

This appeal by the assessee is directed against order of assessing officer dated 28.12.2010 passed under section 143(3), r.w.s. 144C under the direction of dispute resolution panel 1 Mumbai vide direction dated 23.09.2011.

2. The grounds of appeal read as under:

1. *On the facts and circumstances of the case and in law, the learned Assessing officer has erred in making an addition of Rs.*

17,84,41 ,000/-pursuant to order u/s 92CA(3) of the Act. She ought not to have done so.

2. Without prejudice to ground No.1, on the facts and circumstances of the case and in law, the learned Assessing officer erred by not giving effect to the certificatory order dated 22/12/2010 passed by the learned Transfer Pricing Officer u/s 92CA(5) r.w.s 154 of the Act. She ought not to have done so.

3. Without prejudice to ground No.1 and 2, the learned assessing officer ought to have restricted the transfer pricing adjustment to Rs.4,18,04,000/- following the directions of the learned DRP.

4. On the facts and circumstances of the case and in law, the learned Assessing officer has erred in making an addition on account of Modvat under section 145A of the Act to the extent of Rs.9,49,968/-. She ought not to have done so.

5. Without prejudice to ground No.4, on the facts and circumstances of the case and in law, the learned Assessing officer ought to be directed to allow deduction in respect of Modvat credit relating to opening inventory and not to make adjustment in the form of addition of modvat credit relating to closing inventory.

6. On the facts and circumstances of the case and in law, the learned Assessing officer has erred in making an addition of

Rs.8,16,19,125/- u/s 40(a)(ia) of the Act. She ought not to have done so.

7. On the facts and circumstances of the case and in law, the learned Assessing officer has erred in making an addition on account of Interest free deposit/advance of Rs.2,50,000/-. She ought not to have done so.

8. Your appellant craves leave to add, to amend, to modify any of the foregoing grounds or take additional ground if need be.

Apropos ground number 1, 2 and 3

3. Brief facts on this issue as under:-

3.1 BASF Coatings (India) Pvt. Ltd. hereinafter referred to as BCIL, (based at Bangalore) is a 55.4% owned subsidiary of BASF Coating, UK. The company is engaged in manufacturing of Coil Coating in India and supplying them to group companies and other countries as well. The international transactions of the assessee for the relevant previous year are as under:-

| S.No. | International Transaction | Amount (Rs.) | Most Appropriate Method Used |
|-------|------------------------------|--------------|------------------------------|
| 1 | Purchase of Raw Material | 159,148,000 | TNMM |
| 2 | Purchase of Finished Goods | 46,276,000 | TNMM |
| 3 | Payment of Royalty | 21,772,000 | TNMM |
| 4 | Payment of SAP Charges, etc. | 7,830,000 | TNMM |
| | Total ... | 235,026,000 | |

3.2 The assessee has undertaken a Transfer Pricing (TP) study to justify its Arm's Length Price (ALP) for its transactions. It has selected TNMM as the most appropriate method for all the transactions. It has undertaken study from Prowess Data base under the key words "paint and varnishes, and paintings, writing or drawing ink". Thereafter the assessee has applied the filters of data availability from financial year 2005 and manufacturing sales to total sales greater than 90% and has short listed 20 companies engaged in comparable activities. It was observed that two companies namely Asian Paints Ltd. and Goodlas Nerolac Paints Ltd. had been rejected by the assessee on account of related party transactions. When verified from database by TPO, it was found that their related party transactions were negligible and less than 5% which is not disputed. The assessee, however, didn't accept Asian Paints Ltd. and Goodlas Nerolac Paints Ltd., as comparables claiming that the first one has a huge turnover and has engaged in manufacturing decorative paints" whereas the latter is a fore runner in industrial and automotive coatings business and is also engaged in decorative paints and further, it has a collaboration with Kansai Japan which helps them to obtain business.

3.3 However, the TPO has rejected such objections as these two companies are selected in the assessee's own search process and

the assessee's objection is 'only qualitative, and thus is not acceptable. In TPO's view, no two companies are identical, and there may be some dissimilarities in operation, but it has to be seen whether such dissimilarities are material to exclude such companies with the comparable selected by assessee's own robust search. Accordingly, the TPO has included these 2 companies in the list of comparable. Accordingly, the TPO has identified 9 companies under:

| S.no | Comparable Companies | Comparable introduced by | Operation Margin as per assessee | PBIT / Sales as Per TPO (%) |
|------|--|--------------------------|----------------------------------|-----------------------------|
| 1 | Asian Paints Industrial Coatings Limited | Assessee | 2.73% | 4% |
| 2 | Berger Paints India Ltd. | Assessee | 7.23% | 8% |
| 3 | D I C India Ltd. | Assessee | 4.15% | 5% |
| 4 | I C I India Ltd. | Assessee | 7.19% | 54% |
| 5 | Organic Coatings Ltd. | Assessee | 1.10% | 1% |
| 6 | Shalimar Paints Ltd. | Assessee | 4.00% | 5% |
| 7 | Asian Paints Ltd. | TPO | 10.85% | 12% |
| 8 | D I C Coatings Limited | TPO | 10.52% | 10% |
| 9 | Goodlas Nerolac Paints Ltd. (Now Kansai Nerolac Paints) | TPO | 9.22% | 11% |
| | Average | | 6.33% | 12.22% |

3.4 The comparables (including D I C Coatings India Ltd.) include 6 companies identified by the assessee itself. The TPO has proposed to adopt the average PLI (PBIT / Sales) of 9 comparable companies computed at 12.22% for F.Y.2006-07 for determining the ALP.

3.5 The assessee has objected to the TPO's proposal claiming that as per provision of Rule 10B(4), that the date available at the time of filing the return has to be made use of and also objected to the

inclusion of D I C Coatings India Pvt. Ltd. as comparable by the TPO. However, the AO has rejected the assessee's objection and adopting average PLI at 12.22% as shown above margin of 5.02% shown by the assessee, has computed the TP adjustment at Rs.17,84,40,000/-.

3.6 While considering the assessee's objections to the PLI of comparables, TPO has accepted the assessee's claim that while determining the PBIT / Sales, in the case of I C I India Ltd., non-operating "income and expenses" have to be excluded and arrived at the revised margin at 26.55%. However, while computing the ALP I average profit margin, he has adopted PBIT/Sales at 54% only. Subsequently, on the basis of assessee's application u/s. 154, the TPO has passed an order u/s. 154 r.w.s 92CA(5) on 22.12.2010 recomputing the TP adjustment at Rs.10,51,78,000/- in the place of Rs.17,84,41,000/- computed earlier.

4. The Ld. DRP after considering the assessee submissions directed as under:-

"The DRP has carefully considered the facts of the case, the TPO's findings and the submissions furnished on behalf of the assessee. The DRP's directions on this issue are as under:

a) *The TPO has identified the 9 companies from the search process adopted by the assessee itself, and hence, there is no merit in assessee's contention on this point.*

(b) *D I C Coatings Ltd. is found to be comparable based on the financial data for the relevant F.Y.2006-07, and hence, the TPO is correct in including this company.*

(c) *Asian Paints Ltd. and Kansai Nerolac Paints Ltd. are also comparables as pointed out by the TPO, and hence, the assessee contentions are rejected.*

(d) *The TPO is correct in adopting PBIT/Sales, as was done for all the comparables.*

(e) *In the case of I C I India. Ltd. the TPO has recomputed the PLI at 26.55% though he has by mistake omitted to adopt this figure while arriving at the arithmetic mean PLI to 9 companies. In this regard, the assessee's objection is found to be correct. Before the DRP, the assessee has furnished recomputation of PLI of this company as under:*

| <i>Margin Calculation of I C I India Ltd. CPLI = PBIT / Revenue - without prejudice)</i> | |
|--|-------------------|
| <i>ICI India Limtied</i> | <i>March 2007</i> |
| <i>Total Revenue</i> | <i>954.32</i> |
| <i>PBT</i> | <i>140.11</i> |
| <i>Add: Interest</i> | <i>2.29</i> |
| <i>PBIT</i> | <i>142.4</i> |
| <i>PBIT / Revenue</i> | <i>14.92%</i> |

This is after excluding the non-operating income and non-operating expenses as verified from the accounts. TPO has to verify this computation.

(f) By adopting the PLI of ICI India Ltd. at 14.92% the arithmetic mean of PLI for 9 companies is arrived at 7.88% by the assessee which is prima facie found to be correct. Assessee's contends that adopting such modified arithmetic mean PLI of 9 companies @ 7.88%, the TP adjustment works out to Rs.4,18,04,000/- only. TPO j AO is directed to verify the correctness of figures and recompute the TP adjustment/addition accordingly.

(g) The TPO is correct in his approach as he has followed sub-rule (2) of Rule 10B and Sub Rule 10B (4). Hence, assessee's contentions are without merit and hence, rejected.

(h) The TPO is correct in not allowing (+/-) adjustment as per Proviso to Sec.92C(2) claimed by the assessee, the DRP is of the view that there is no need to allow such relief as it is allowable only when assessee makes adjustment and not TPO. Further, the Board Circular dated 30th September, 2010, amending earlier Circular No.5 of 2010 dated 03.06.2010

clearly explains the scope of amendment brought out through Finance Act, 2009 w.e.f 01.10.2009 that the safe harbor rule of providing adjustment of (+/-) 5% is applicable only where the difference between the price shown by the assessee and ALP determined by the TPO is less than 5% and not otherwise. The decision of the ITAT in the case of Marubeni India Pvt. Ltd. v/s. ACIT (ITAT Delhi) also supports the above view.

(i) We would like to mention that DRP in the assessee's case for A.Y.2006-07 has upheld similar TP adjustment by including the two comparables M/s. Asian Paints Ltd. and Berger Paints India Ltd.

Accordingly, the TPO/AO is directed to recomputed the TP adjustment as per directions given after verifying the correctness of the PLI of I C I India Ltd. as discussed above."

5. Against the above assessee is in appeal before us. We have both the counsel and perused the records.

6. Ld. Counsel of the assessee has submitted that assessee has pointed out some basic flaws in the workings of the A.O. Accordingly assessing officer has passed an order u/s. 154 of the Income Tax Act dated 22.12.2010, which is subsequent to the date of the direction by the learned dispute resolution panel. Ld. Counsel for the

submitted that if the order passed u/s. 154 of the Income Tax Act by the A.O is subjected to the directions of the dispute resolution panel the variation may be within the +/- 5% variation and accordingly no arm's length adjustment will be required. In this regard the Ld. Counsel of the assessee has submitted following workings;

"Margin working for ICI India Limited as computed by the TPO- 14.92% (As per the directions of the DRP)

| Name of Comparable | PBIT/Sales as computed in the order |
|---------------------------------------|-------------------------------------|
| ICI India Ltd | 14.92% |
| Asian Paints Industrial Coatings Ltd. | 4.00% |
| Asian Paints Ltd. | 12.00% |
| Berger Paints India Ltd. | 8.00% |
| DIC India Ltd. | 5.00% |
| Kansai Nerolac Paints Ltd. | 11.00% |
| Organic Coatings Ltd. | 1.00% |
| Shalimar Paints Ltd. | 5.00% |
| DIC Coatings Limited | 10.00% |
| Airthmetic Mean | 7.88% |

+/-5% Variation between ALP and international transaction.

| PLI | | PBIT/Sales | Say Sales is Rs. 100 |
|-------------------------------------|-----------------------|------------|----------------------|
| Particulars | | Rs. | Rs. |
| Sales | (A) | 1,460,239 | 100 |
| Cost | (B) | 1,386,976 | 94.98 |
| Operating Profit/ Loss | (C) = (A) - (B) | 73,263 | 5.02 |
| Margin of the Assessee | | 5.02 | 5.02 |
| Arm's Length margin as per TP Order | D=As calculated above | 7.88% | 7.88% |
| Arm's Length Price {Cost} | (E) = (A) - (A X D) | 1,345,172 | 92 |
| Difference | (F) - (B) - (E) | 41,804 | 3 |
| 5% of Transfer Price | (G) = (B) X 5% | 69,349 | 4.75 |

| Conclusion | | | |
|--|---|--------------|--------------|
| Since, variation between the ALP and value of international transaction does not exceed 5% of the latter, the price at which the international transaction has actually been undertaken is be deemed to be the arm's length price. | If $F < G$, the transaction is at arm's length | Arm's length | Arm's length |

”

7. Per contra Ld. D.R submitted that the she has reservations to the above computation, however she did not object to the proposition that the issue may be remitted to the file of the A.O to verify the veracity of the computations, now being submitted by the Ld. Counsel of the assessee.

8. Upon careful consideration we are of the considered opinion that the issue in this case needs to be remitted to the file of the A.O. The A.O shall consider the workings given by the Ld. Counsel of the assessee in the light of the order passed u/s. 154 of the Income Tax Act along with the directions of the dispute resolution panel. Thereafter the A.O shall decide as per law after giving the assessee proper opportunity of being heard.

Apropos ground no. 4 and 5

9. Brief facts on this issue are that it is claimed by the assessee that AO should have allowed deduction in respect of modvat credit

relating to opening inventory without making any adjustment to the closing inventory. It is also claimed by the assessee that assessee is following exclusive method of accounting in respect of mod vat credit on purchases of raw materials as prescribed by the Accounting Standard - 2 issued by the Institute of Chartered Accountants (ICAI) and also in accordance with the directions of ITAT Mumbai Bench in the case of Hawkings Cookers Ltd. Vs. ITO, reported in (2008) 14 DTR (Mum) 206. The AO, however, did not accept the assessee's claim and after giving credit for similar addition made towards the value of closing inventory u/s. 145A for A.Y.2006-07, has made adjustment u/s.145A of the difference in modvat credit (balance) available, between the closing inventory and opening inventory of Rs.9,49,968/-.

10. Upon assessee's objection the Ld. DRP held as under:-

"The DRP has considered the assessee's submission found that there is no merit in the same. Adjustment towards, modvat credit in the value of closing."

11. Against the above assessee is in before us we have heard both the counsel and perused the records. Ld. Counsel of the assessee submitted that adjustments in this regard need to be done in purchases sales opening stocks as well as closing stocks that the tax auditor after due examination has observed that no impact has been

observed in this regard. Hence he pleaded that A.O's action of adjusting the opening and closing stocks is not justified.

12. Upon careful consideration we find that the assessee has submitted before the assessing officer as well as the learned dispute resolution panel that assessee is following exclusive method of accounting in respect of modvat as prescribed by the accounting standards-2 of the Institute of chartered accountants of India and also in accordance with the directions of ITAT Mumbai bench in the case of Hawking's Cookers Limited vs ITO 14 DTR 206. The assessee has also stated that the tax audit report clearly mentions that no adjustment in view of the section 145A of the Income Tax Act is required. The authorities below have rejected the submissions without pointing out any reason as to why the above submissions of the assessee deserve to be rejected. It is settled law that even administrative order have to be consistent with the rules of natural justice. This position was reiterated by the Hon'ble Apex Court in the case of Sahara Farms 300 ITR 403. Hence in view of the above submissions of the assessee which have not been controverted by the authorities below by a speaking order, we set aside the order's of the assessing officer on this issue and decide the issue in favour of the assessee.

Apropos ground no. 6

13. The Ld. A.O has proposed to disallow Rs.8,16,19,125/- u/s.40(a)(ia) of the I.T. in respect of the following payments:

| | |
|--|------------------|
| Rent | Rs.1,09,71,000/- |
| Professional Services | Rs. 37,47,000/- |
| Freight, Packing and Handling Charges | Rs.3,35,67,000/- |
| Royalty | Rs.2,17,72,000/- |
| Purchase of Service from holding company | Rs. 5,91,125/- |
| | Rs.8,16,19,125/- |

In response to the AO's query, the assessee's claimed that in clause 27 of the Tax Audit Report, it is reported that assessee has complied with the provisions of TDS (Chapter XVII-B) under the Act, and also claimed that in case any disallowance is proposed it may be made on estimate basis subject to rectification. As the assessee was unable to furnish any evidence to support its claim of compliance to the provisions of TDS in respect of the above payments, AO has disallowed the total amount of such payments of Rs.8,16,19,125/- u/s.40a(ia) of the ACT.

14. The Ld. DRP noted that assessee has how furnished details included Xerox copies of TDS payment challans. The Ld. DRP directed as under:-

The Ld. DRP has considered the assessee's claim on merits. While the assessee has not furnished such details of TDS made and computation thereof, before the A.O the same were filed, during the course of the hearing before the DRP. Considering that the assessee

has substantially complied with the TDS provisions, its claim needs verification. Hence, the TPO is directed to go through the details filed and recompute the disallowance u/s.40a(ia). The assessee should furnish the complete details of TDS payment and compliance afresh before the AD within a week from the receipt of directions of DRP without waiting for any notice / letter from the AO. The AO shall verify the same and amend/modify the disallowance accordingly.

15. We find that despite direction by the Ld. DRP the assessing officer has not given effect to the direction. The A.O's has observed that assessee has not submitted details in this regard. However, the Ld. Counsel of the assessee has objected to the same. Upon careful consideration we find that Ld. DRP also noted that assessee has furnished evidences and particulars which the DRP wanted the assessing officer to examine and act upon. In the interest of justice we remit this issue again to the file of the assessing officer. Assessing officer is directed to give effect to the direction of the Ld. DRP after giving the assessee proper opportunity of being heard.

Apropos ground no. 7

16. The AO has found that the assessee has given advance/deposit of Rs.25,00,000/- to Mr. Rishabh Saksena and Mrs. Anu Saksena. As assessee has not furnished the details of the deposit/advance,

the AO has treated the same as advance given without any purpose for the business carried on by the assessee, and computed 10% of such advance, as interest and added an amount of Rs.2,50,000/- as income.

17. Before the DRP, the assessee has contended that the amount of Rs.25 lacs is given to the above 2 persons as deposit as per the Lease & Licence Agreement of the contract with them. It was explained that they have taken a premises on rent from Mr. Rishabh Saksena and Mrs. Anu Saksena as per the Lease and Licence Agreement (with them) dated 24.04.2007 and such premises taken by the assessee company is for residence of Chief Executive Dr. D. Ramkurnar, employee of the company and the perquisite value of such accommodation provided to him was included in his salary for the purpose of TDS u/s.192.and as the advance was given in the course of business carried on by the assessee addition made by the AD may be deleted. Copy of lease agreement and salary particulars of Mr. Ramkumar were filed.

18. The Ld. DRP directed as under:-

The DRP has considered the submissions of the assessee and found that the assessee's claim is not correct. The perquisite value of the residential accommodation is not included in Mr. Ramkumar's salary for A.Y.2007-08. Further, the Lease and Licence Agreement is

dated 25.04.2007 for a period of 33 months, whereas the relevant previous year is F.Y.2006-07. Hence, this agreement has no relevance for AY.2007-08. Hence, the AO is correct in computing interest on advance given at 10% for the A.Y.2007-08. The AO should proceed to make additions as proposed. The objection of the assessee is hence rejected.

19. Against the above order assessee is in before us. We have heard both the counsel and perused the records.

20. Ld. Counsel of the assessee submitted that the advance was given in the month of March 2007 on 22.03.2007. Due to some corrections in the draft agreement, the final agreement was entered into on 24.04.2007. Hence Ld. Counsel submitted that this small gap cannot lead to the conclusion that assessee has earned a notional income on the said deposit for the whole year. Ld. Counsel submitted that this was a normal and reasonable delay between the date of deposit and the final agreement, and hence no adverse inference for the assessee's earning of notional income should be made. In this regard Ld. Counsel also placed reliance upon case laws for the proposition that any addition for notional income without the income having been actually earned is not permissible.

17. Heard the Ld. D.R. We find considerable cogency in the submission of the Ld. Counsel of the assessee. The deposit was

made at the end of the financial year for entering into the agreement for rent for the accommodation to be used by the employee. There was slight delay in finalising the agreement, which can be considered to be reasonable. Hence we agree with the Ld. Counsel of the assessee that facts and circumstances do not warrant and addition of notional income on the deposit in the hand of the assessee. Accordingly we said aside the order's of the parties below the decide the issue in favour of assessee.

In the result assessee's appeal is allowed for statistical purposes.

Order pronounced in the Open Court on 28.04.2017

Sd/-

**SANDEEP GOSAIN
JUDICIAL MEMBER**

MUMBAI, DATED: 28.04.2017

Sd/-

**SHAMIM YAHYA
ACCOUNTANT MEMBER**

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.

BASF Coatings India P.Ltd
ITA no.1555/Mum./2012
By Order

Nishant Verma

Sr. Private Secretary

(Dy./Asstt.Registrar)

ITAT, Mumbai

| | | Date | Initial | |
|----|--|------------|---------|-------|
| 1. | Draft dictated on | 19.04.2017 | } | Sr.PS |
| 2. | Draft placed before author | 26.04.2017 | | Sr.PS |
| 3. | Draft proposed & placed before the second member | -- | | JM/AM |
| 4. | Draft discussed/approved by Second Member | -- | | JM/AM |
| 5. | Approved Draft comes to the Sr.PS/PS | .04.0217 | } | Sr.PS |
| 6. | Date of pronouncement | .04.2017 | | Sr.PS |
| 7. | File sent to the Bench Clerk | .04.2017 | | Sr.PS |
| 8. | Date on which file goes to the Head Clerk | | | |
| 9. | Date of dispatch of Order | | | |