IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : I : NEW DELHI

BEFORE SHRI R.S. SYAL, AM AND SHRI GEORGE GEORGE K. JM

ITA No.282/Del/2012
Assessment Year : 2003-04

DCIT, Circle 11(1), Room No.312, CR Building, New Delhi.	Vs.	Insilco Ltd., 3rd Floor, Central Wing, 124, Janpath, New Delhi. PAN: AAACI1203N
(Appellant)		(Respondent)

Assessee By : Shri Peeyush Jain, CIT, DR
Department By : Shri V.P. Gupta, Advocate

ORDER

PER R.S. SYAL, AM:

This appeal by the Revenue arises out of the order passed by the CIT(A) on 22.11.2011 in relation to the assessment year 2003-04.

2. First ground is against the deletion of addition of ₹50,10,463/- made by the AO on account of transfer pricing adjustment. Briefly stated, the facts of the case are that the assessee was initially

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formed as a joint venture in 1988. Subsequently, in April, 1999, it became a subsidiary of Degussa A.G., Germany, which holds 68.25% of the shares in the assessee company. The assessee is engaged in the business of manufacturing and sale of silica. During the year under consideration, it entered into international transactions with three of its associated enterprises, namely, Degussa AG, Germany; J.J. Degussa Chemicals, Indonesia; and J.J. Degussa Chemicals, Philippines. These international transactions were on account of export of silica with sale value of ₹5,12,00,053/-. The assessee benchmarked these international transactions by using Comparable uncontrolled price (CUP) as the most appropriate method. On comparison of the rates charged by the assessee from its AEs and unrelated parties, it was found by the TPO that in certain transactions, the price charged from its AEs was lower as compared to that charged from non-AEs and further such difference was more than 5%. On being show-caused to explain the reasons for charging lower price from its AEs, the assessee contended that there were certain geographical differences and economic adjustments which led to the difference in the rates charged from AEs and non-AEs. Apart from that,

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certain other objections were also taken by the assessee to the working of the TPO, divulging difference in the rate charged from non-AEs. The TPO required the assessee to supply information about the resale price of the goods sold by the AEs as, in some cases, the goods purchased by the AEs from the assessee were resold to other customers. No such information was supplied by the assessee. It was also noticed that the assessee made sale to group entities in South Africa and Latin America through Degussa, West Germany. On the analysis of the transfer pricing report, the TPO noted that the 2/3rd of the related enterprises were located in Indonesia and Philippines and the unrelated enterprises were located in Indonesia, Philippines, Sri Lanka and Bangladesh. The only other AE was located in Germany. After taking into consideration of the relevant arguments made on behalf of the assessee, the TPO proposed the transfer pricing adjustment of ₹54,10,463/-, which was made by the AO. In the appeal before the ld. CIT(A), the assessee raised additional ground to the effect that Transactional net margin method (TNMM) should be adopted as the most appropriate method for computing the arm's length price (ALP). The ld. CIT(A) remitted the additional ground along

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with the necessary documents to the TPO for comments. The TPO, vide his remand report dated 13.09.2011, objected to the admission of additional ground and contended that the same be rejected. Taking into consideration the Special Bench decision in the case of *Quark Systems Pvt. Ltd. Vs. ITO 2010-TIOL-31-ITAT-CHD-SB,* the ld. CIT(A) admitted the assessee's additional ground. The assessee contended that the internal TNMM should be applied to benchmark the international transactions undertaken by it. Creating the segmental accounts for this purpose, the assessee allocated expenses and incomes in certain percentage and demonstrated to the CIT(A) that the profit charged from AEs was higher than that charged from non-AEs. The ld. CIT(A) got convinced with the assessee's submissions and ordered for the deletion of addition. In reaching this conclusion, the ld. CIT(A) also referred to the Tribunal order passed for the immediately preceding assessment year, namely, 2002-03, remanding the matter to the AO/TPO and also the view taken by the TPO for the AYs 2007-08 and 2008-09 accepting the application of TNMM.

3. We have heard the rival submissions and perused the relevant material on record. It is observed that the assessee

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applied CUP as the most appropriate method for benchmarking the international transactions undertaken by it. The assessee did not dispute before the TPO that the CUP was the most appropriate method. However, it was only during the course of first appellate proceedings that the assessee came out with an additional ground contending that the most appropriate method was TNMM and the same should be applied. The reason advanced for not applying the CUP method was that there were no instances of uncontrolled transactions in Germany and the assessee had also entered into certain international transactions with Degussa AG, Germany. The ld. AR vehemently argued that the Tribunal was pleased not to accept the application of CUP as the most appropriate method in its order for the AY 2002-03 because in that year also, like the current year, there were international transactions with Degussa AG, Germany and no transactions with non-AEs situated at Germany were undertaken by the assessee. These facts indicate that the facts and circumstances of the instant year are, *mutatis mutandis*, similar to those for the assessment year 2002-03. We have perused the order dated 05.08.2011 passed by the Tribunal in assessee's case for the AY

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2002-03, a copy of which has been placed on record. In such earlier year also, the assessee applied the CUP method for benchmarking its international transactions. It was contended before the Tribunal that no exports were made to any uncontrolled parties in South American countries and, hence, CUP method could not be applied in respect of sales made through Degussa AG, Germany to various jurisdictions in South American countries. After considering the entire gamut of the contentions and the factual position, the Tribunal held in para 8.4 of its order as under:-

> "8.4 We have considered the facts of the case and rival submissions. We do agree with the submissions of the learned counsel that CUP method is not appropriate in respect of sales made to the Degussa, AG, Germany. The reason is that there is no instance of uncontrolled sale either to Germany or to South American countries where the goods were actually shipped by the assessee on CIF basis. In these circumstances, *we think it fit to restore the whole matter to the file of the Assessing Officer for fresh determination of the arm's length price of international transactions with AEs by applying an appropriate method and after hearing the assessee.* It is specifically mentioned that the Assessing Officer is not bound by any argument made before us or observation made by us and he shall proceed in a manner as if this issue is being decided for the first time. Thus, ground No.2 in the appeal of the assessee and ground No.1 in the appeal of the revenue are treated as allowed for statistical purposes."

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4. A cursory look at the observations made by the Tribunal in assessee's case for the immediately preceding year divulges that the Tribunal did not uphold the application of TNMM. Rather, the entire matter for fresh determination of the ALP, by applying an appropriate method, stood restored.

5. The contention of the ld. AR that the viewpoint taken by the ld. CIT(A) in adopting TNMM should be upheld, in our considered opinion, is not capable of acceptance at this stage. The larger question before us is not only the application of a particular method for determination of ALP, but also the calculation part. It can be seen from the impugned order that in order to demonstrate that the price charged from its AEs was at ALP, the assessee created segmental accounts. It is not a case where the assessee had prepared separate accounts in respect of different segments, which were produced before the TPO during the course of original proceedings. Rather, the consolidated accounts were bifurcated into the transactions with AEs and non-AEs by allocating expenses/incomes, mainly based on sales. Such allocation never came to be considered by the TPO because it was

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done for the first time before the ld. CIT(A). When the ld. first appellate authority sent such calculations and the assessee's request for admission of additional ground on this aspect, the TPO raised a preliminary issue by objecting to the admission of this additional ground and, as such, did not have any occasion to verify the correctness of allocation of expenses/income.

6. Further, the ld. CIT(A) appears to have been swayed by the application of TNMM by the TPO for the A.Ys. 2007-08 and 2008-09 in holding that this was the most appropriate method for application, despite the fact that the order of the tribunal for the immediately preceding A.Y. 2002-03 was before him in which the question of the application of the appropriate method was restored. There is no material on record that pursuant to such direction given by the tribunal for the preceding year, the TPO/AO have accepted the application of TNMM as the most appropriate method.

7. We do not find any force in the argument of the ld. AR that simply because the TPO has applied TNMM for the A.Ys 2007-08 and 2008-09 and hence the application of the same by the ld.

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CIT(A) be upheld. This factor, though significant, but is not conclusive. What persuaded the TPO to observe departure in these two later years from the consistent stand taken by him in the immediately preceding four years up to A.Y. 2006-07 in following the CUP method, is not available on record. There may have been some change in the factual position necessitating the adoption of TNMM in these later years. Further, the mere fact that the TPO adopted TNMM in a later year can be no ground to argue before the tribunal that the same method be followed in a preceding year, which stand has been specifically rejected by him in the instant years. As such, we cannot uphold the application of TNMM on this reason alone, more specifically, when in the immediately preceding year, where the facts are admittedly similar, the tribunal has restored the matter to the TPO for *de novo* adjudication. Since the facts and circumstances of the instant year are admittedly similar to those of the immediately preceding year, in respect of which the Tribunal has given unambiguous direction for *de novo* determination, respectfully following the precedent, we set aside the impugned order and remit the matter to the file of TPO/AO for fresh determination of

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the issue in accordance with the directions given by the Tribunal for the AY 2002-03.

8. Ground No.2 of the appeal is against the deletion of addition of ₹5,04,072/- made by the AO on account of disallowance of renovation and maintenance expenses. The facts apropos this ground are that the assessee claimed deduction of ₹2.24 crore under the head 'Miscellaneous expenses'. This included a sum of ₹25,20,361/- incurred on account of renovation and maintenance of Vasant Vihar office. In the absence of any details furnished on behalf of the assessee, the AO disallowed 20% of such expenses, which resulted into addition of ₹5,04,072/-. The ld. CIT(A) ordered for the deletion of this appeal.

9. After considering the rival submissions and perusing the relevant material on record, it is observed that the sum of ₹25.20 lac was not towards any renovation of building, but, paid to a company, namely, Towerbase Services Pvt. Ltd., as maintenance charges for Vasant Vihar office on monthly basis. Month-wise details of such payment made aggregating to ₹25.20 lac were made available to the ld. CIT(A), which were sent to the AO for

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comments. No objection was taken by the AO to the correctness of the nature of amount in the remand report. Under such circumstances, we are of the considered opinion that the view taken by the ld. CIT(A) in allowing deduction for the full amount, which was incurred for the maintenance of office on monthly basis, does not require any interference. This ground is not allowed.

10. The last ground of this appeal is against the deletion of addition out of ₹88,000/- made by the AO on account of ISO certification fee paid by the assessee. The assessee paid a sum of ₹88,000/- towards ISO certification fee. Considering certain judgments, the AO came to hold that the assessee acquired an enduring advantage by getting approval of Quality Management System to ISO-9002 norms and, hence, it was a capital expenditure liable for depreciation @ 25%. That is how, the addition of ₹66,000/- was made. The ld. CIT(A) deleted this addition.

11. After considering the rival submissions and perusing the relevant material on record, it is noticed that the payment of ISO

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certification fee is a routine expenditure incurred on annual basis. By no stretch of imagination it can be considered as amounting to acquisition of a capital asset or advantage of an enduring nature. We, therefore, approve the view taken by the ld. CIT(A) on this issue. This ground fails.

12. In the result, the appeal is partly allowed for statistical purposes.

The order pronounced in the open court on 31.10.2014.

Sd/-	Sd/-
[GEORGE GEORGE K.] JUDICIAL MEMBER	[R.S. SYAL] ACCOUNTANT MEMBER

Dated, 31st October, 2014.

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.

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