IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "A", HYDERABAD

BEFORE SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER
AND SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER

ITA No. 549/Hyd/2014 – A.Y. 2009-10

The Deputy CIT Circle-16(3) Hyderabad Appellant	vs	M/s. Owens Corning Industries (India) Pvt. Ltd. Hyderabad PAN: AAACV9858N Respondent

ITA No. 595/Hyd/2014 – A.Y. 2009-10

M/s. Owens Corning Industries (India) Pvt. Ltd. Hyderabad PAN: AAACV9858N Appellant	vs	The Deputy CIT Circle-16(3) Hyderabad Respondent

Revenue by: Sri P. Soma Sekhar Reddy
Assessee by: Sri H. Srinivasulu

Date of hearing: 22.07.2014
Date of pronouncement: 13.10.2014

ORDER

PER ASHA VIJAYARAGHAVAN, JM:

The above appeals both by the assessee and the Department are directed against the directions of the Dispute Resolution Panel (DRP), Hyderabad dated 20.12.2013 for A.Y. 2009-10.

2. Brief facts of the case are that M/s. Owens Corning Industries (India) Pvt. Ltd., the present assessee, is engaged in the business of manufacturing and trading of glass fibre products and articles thereof. It produces glass fibre based reinforcement products including chopped strand mat, roving and woven and stitched

products and speciality products such as Cem-FIL, TWINTEX, Glassmen and other technical fabrics. The group produces glass fibre used to reinforce composite materials used in transportation, electronics, marine, wind energy and other high performance markets to insulation, roof and stone veneer which is wholly owned subsidiary of OCV Chambery International, France. OCV Reinforcements Manufacturing Ltd., has undergone change of name as Owens Corning Industries (India) Pvt. Ltd.

3. The assessee filed its return of income for A.Y. 2009-10 on 13.9.2009 admitting total income of Rs. 18,50,68,771. A reference u/s. 92CA was made on 15.12.2011 by the DCIT, Circle-16(3), Hyderabad (the AO) with the approval of CIT-IV, Hyderabad to the DCIT (Transport Pricing Officer-II). The TPO-II passed an order u/s. 92CA(3) of the Act on 13.12.2012 in which the arms length price (ALP) was determined at Rs. 2,04,46,304 as against the price charged by the assessee in the international transactions at Rs. 4,40,27,472 and the shortfall of Rs. 2,35,81,168 was treated as transfer pricing adjustment u/s. 92CA of the Act. The AO passed the draft assessment order u/s. 143(3) r.w.s. 92CA r.w.s. 144C on 6.3.2013 making an addition of Rs. 2,35,81,168 towards ALP adjustment as determined by the TPO and disallowed excess claim of depreciation of Rs. 17,51,976. Thus, the AO determined the total income at Rs. 21,04,01,914 as against income returned of Rs. 18,50,68,770.

4. Aggrieved by the draft assessment order and the order passed by the TPO, the assessee has submitted an application on 10.4.1023 to the Dispute Resolution Panel (DRP), Hyderabad raising objection against the addition made by the AO/TPO. The DRP relied on the decisions in assessee's own case for A.Ys. 2001-01 and 2007-08 and granted depreciation on the non-compete and marketing net worth rights. The DRP, however, upheld the restriction made by the TPO of royalty payment to 2.0% instead of 4% of net sales. Both assessee and the Department have come up in appeal against the order of the DRP and we dispose of both the appeals by this consolidated order.

5. Firstly we adjudicate the grounds of appeal raised by the assessee in ITA No. 595/Hyd/2014 for assessment year 2009-10, which read as follows:

> 1. General
>
> 1.1 Based on the facts and circumstances of the case and in contrary to law, Owens Corning Industries (India) Private Limited respectfully craves leave to prefer an appeal against the order passed by the Deputy Commissioner of Income-tax, Circle 16(3), Hyderabad dated 30th January, 2014 in pursuance of the directions of the Dispute Resolution Panel, Hyderabad dated 27th November, 2013 under section 143(3) read with section 144C of the Income-tax Act, 1961.
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> 2. Transfer Pricing Adjustments
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> 2.1. The assessment order passed by the Learned AO under section 143(3) r.w.s. 144C and read with the order passed

by the Learned Transfer Pricing Officer (hereinafter referred to as 'TPO'), under section 92CA(3) of the Act, is bad in law and void ab-initio.

2.2 Based on the facts and circumstances of the case and in law, the Learned AO/DRP erred in making an adjustment of Rs. 2, 22, 05, 021 to the income of the Appellant and in holding that the transaction between the appellant and its associated enterprise was not at an Arm's Length Price (hereinafter referred to as 'ALP ').

2.3 Based on the facts and circumstances of the case and in law, the Learned AO/DRP erred in making an adjustment of Rs. 2,22,05,021 to the income of the appellant by wrongly determining the ALP of royalty paid by the appellant at 2.00% instead of 4.04% on net sales on the ground that no tangible benefit was derived by the appellant out of the payment of royalty

2.4 Based on the facts and circumstances of the case and in law, the Learned TPO/AO/ DRP erred in making several observations and findings without appreciating evidence and understanding the intricacies of the facts of the case.

2.5 Based on the facts and circumstances of the case and in law, the Learned TPO/AO/DRP erred in disregarding the commercial agreements entered into by the appellant without any valid and cogent reasons.

2.6 Based on the facts and circumstances of the case and in law, the Learned TPO/AO/ DRP has erred by acting in an arbitrary manner and did not follow any prescribed Transfer Pricing methodology (as required under section

92C of the Act read with rule 10B of Income Tax Rues, 1962) while determining the ALP for payment of royalty.

2.7 Based on the facts and circumstances of the case and in law, the Learned AO/DRP erred in considering that the Comparable Uncontrolled Price (hereinafter referred to as CUP) method as the most appropriate method under section 92C of the Act to arrive at the ALP of the royalty paid by the appellant to its Associated Enterprise.

2.8 Based on the facts and circumstances of the case and in law, the Learned AO /DRP erred in confirming the TPO's stand in disregarding the Transactions Net Margin Method (hereinafter referred to as 'TNMM ') as the most appropriate method in benchmarking the payment of royalty to the associated enterprise by the appellant.

2.9 Based on the facts and circumstances of the case and in law, the Learned AO/ DRP/TPO erred in disregarding the approval given by the Reserve Bank of India with regard to the rate at which the payment of royalty made to the associated enterprise.

3. The Learned AO/DRP erred in not granting the credit of Rs. 62,22,950 for the brought forward Minimum Alternate Tax (MAT) paid by the Appellant for the AY 2007-08.

4. The Learned AO/DRP erred in computation of interest liability under sections 234C and 234D.

5. The Learned DRP erred in law and on facts by summarily rejecting the appellant's objections and disregarding the material placed on record thereby

not following the procedure laid down u/s. 144C(5), 144C(6) & 144C(7) of the Act.

6. The appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.

6. Ground No. 1 is general in nature and needs no adjudication. Ground No. 1 is dismissed being general in nature.

7. Ground No. 2 i.e., sub-grounds 2.1 to 2.9, relate to Transfer Pricing adjustments. In the various sub-grounds raised, we find that sub-ground Nos. 2.1 and 2.2 are general in nature and need no adjudication. Accordingly sub-ground Nos. 2.1 and 2.2 are dismissed being general in nature.

8. Sub-ground Nos. 2.3 to 2.9 relate to restriction of payment of royalty to 2% (instead of 5% and 4%) of the net sales by the assessee to Owens Corning Invest Cooperatief U.A., Netherlands. The TPO restricted the payment or royalty to Rs. 2,04,46,304 thereby enhancing the total income of the assessee u/s. 92CA(3) by an amount of Rs. 2,35,81,168. The TPO arrived at this conclusion of restriction of royalty payment by the assessee by bench-marking it (i.e., perform comparability analysis) with the payment or royalty by a comparable company. On performing comparability analysis, the TPO arrived at a single comparable viz., Asahi India Glass Ltd., holding that the said comparable (M/s. Asahi India Glass Ltd.) was having a joint venture and was similar in composition with the assessee and that the comparable

had paid 1.91% of the turnover as royalty and hence the assessee royalty rate was also be the same i.e., 2%.

9. While arriving at this conclusion, the TPO considered the submissions of the assessee and agreed that the assessee received technical assistance while disagreeing with the quantum of royalty payment for the said assistance by the assessee at 5% and 4% of the net of its sales. The TPO held that by these royalty payments there is no comparable increases in turnover or profits for financial year 2006-07, 2007-08 and 2008-09 and hence the value addition of royalty was not apparent.

10. The TPO also perused the royalty agreement and other details submitted by the assessee where it was seen that the assessee was granted non-exclusive, non-transferable licence to make payments in India and also to sell products to affiliates. The licensor (Owens Corning Invest Cooperatief U.A., Netherlands) granted right to use "Owens Corning" mark and the royalty agreement further required the licensee (the assessee) to pay the licensor 4% of the net sales. The TPO was given copies of Emails which reflected the tangible assistance rendered to the assessee by the licensor/ payee and the TPO was also provided with PowerPoint Presentation detailing manufacturing process of the assessee. The assessee also submitted to the TPO that the trade mark of glass fibre for non-textile purposes under the name "Advantex" was supplied by Owens Corning Invest Cooperatief U.A., Netherlands.

11. The TPO held that grant of "trade mark" is wrongly mentioned as "patent" in the TPO's order page 8 does not determine the arms length nature of transaction and the royalty right mainly depends on the premium of the intangible commands in the market, the uniqueness of the intangible and also the period for which the uniqueness remains. The TPO instead carried out a study to obtain comparable transactions in the open markets and the royalty right paid by such comparable companies and arrived as stated above at the rate of 2% and adopted the rate of royalty payment in the case of Asahi India Glass Ltd.

12. The DRP while agreeing to the CUP method adopted by the TPO only for royalty transaction of the assessee directed the AO to take into account both AE and non-AE sales from which the component of excise duty alone should be deducted which resulted in net sales of Rs. 108,84,81,414 and on this sum the adjustment u/s. 92CA(3) should be worked out.

13. We have heard both the parties. From the facts and circumstances of the case before us, it is clear that the assessee was being rendered technical assistance through the royalty agreement entered into with Owens Corning Invest Cooperatief U.A., Netherlands and the royalty agreement has been in application from 1.7.2008. We are of the opinion that the TPO was incorrect in going into the business expediency of payment of royalty and arriving at the conclusion of the quantum of the royalty. We find support for this proposition in the decision of Hon'ble Delhi High Court in CIT vs. EKL Appliances (345 ITR 241)

(Del) wherein the Hon'ble Delhi High Court had occasion to consider the disallowance of royalty by TPO and held that if the expenditure has been incurred or laid out for the purposes of business it is no concern of the TPO to disallow the same on any extraneous reasons. In the case of Ericsson India Pvt. Ltd. vs. DCIT (ITA No. 5141/Del/ 2011) the Delhi High Court decision in CIT vs. EKL Appliances (supra) was followed wherein it was held that "it would be wrong to hold that the expenditure should be disallowed only on the ground that these expenses were not required to be incurred by the assessee".

14. We also draw support from the decision of Ahmedabad Bench in KHS Machinery (P) Ltd. vs ITO (146 TTJ 692) where in the Tribunal on the issue of disallowance made by TPO of payment of Royalty held that

> *"The assessee had not made the one-time payment but making the continuous payment to the know-how provider which has been accepted by the Department in the past. The Assessee has been charging 5 per cent royalty on each and every transaction and therefore the said payment cannot be said to have been paid on the aggregate amount, as argued by learned CIT-Departmental Representative. The findings of the AO in considering the royalty charges as nil as ALP cannot be accepted since the AO in the present case has not brought on record, the ordinary profits which can be earned in such type of business. Therefore in our view the payment of royalty is not hit by the provisions of s. 92 of the Act and there is no reason to hold that the expenses should not be allowed under s. 37(1) of the Act, since the expenditure has been incurred by the assessee during the course of business and is having the nexus with the business of the assessee. Therefore the payment of royalty is*

a business expenditure which has been incurred wholly and exclusively for the purpose of business of the assessee and same is to be allowed in toto as a matter of commercial expediency. Therefore, the case laws relied upon by the learned CIT-Departmental Representative are of no benefit to the Revenue. The reasonableness of expenditure in the present circumstances and facts of case cannot be doubted and accordingly the A 0 is directed to allow the claim of the assessee and the order of learned CIT(A) is reversed .... "

15. We also draw support from the division of Co-ordinate Bench M/s. Air Liquide Engg. India (P) Ltd., vs DCIT (ITA No. 1040/Hyd/2011, 1159/Hyd/2011 and 1408/Hyd/2010) dated 13th February 2014 wherein it was held that

"18. Hence, what we see is the TPO sitting on judgment on the business and commercial expediency of the assessee which is erroneous as per the provisions of the Act as laid down clearly by the Hon'ble Delhi High Court in EKL Appliances (supra).

19. It is also noted that various Tribunals such as DCIT vs. Sona Okegawa Precision Forgins Limited (ITA No. 5386/Del/2010), Hero Motocorp Limited vs. Addl. CIT (ITA No. 5130/Del/2010). ThyssenKrupp Industries India Ltd vs Addl. CIT (ITA No. 6460/Mum/2012), Abhishek Auto Industries Ltd. vs. CIT (ITA No. 1433/Del/2009) have taken a view that REI approval of the Royalty rates itself implies that the payments are at Arm's Length and hence no further adjustment needs to be made viewed from this angle too."

16. Furthermore, the assessee claimed that the Royalty agreement was originally entered with Saint Gobain Vetrotex France S.A.) from 1.7.2001 to 30.6.2008 and that agreement called for 5% of net "ex-factory sales price"

as royalty payment. Further, by way of a supplementary agreement dt. 8.5.2002 the approval for payment towards foreign technology transfer sanctioned by RBI was incorporated in the original agreement (refer page 6 & 7 of TPO order dt. 13.12.12). Finally it is seen that Saint Gobain Vetrotex France S.A. is now known as Owens Coming Invest Cooperatief, Netherlands with which subsequent agreement dt. 1.7.2008 was made and under whom the payments were made in the impugned assessment year 2009-10. In short, the assessee has claimed that the royalty payments were based on agreement which was approved by RBI and hence the TPO cannot question the same.

17. We find merit in this claim that once the RBI approval of royalty rate was obtained the payment was considered to be held at arm's-length. It is also noted that various Tribunals such as Air Liquide Engg. India (P) Ltd, Hyderabad (ITA No.1159, l040/Hyd/2011 & ITA No.1408/ Hyd/ 2010), DCIT vs. Sona Okegawa Precision Forgins Limited (ITA No. 5386/DeI/2010), Hero Motocorp Limited vs. Addl. CIT (ITA No. 5130/Del/2010), ThyssenKrup Industries India Ltd vs Addl. CIT (ITA No. 6460/Mum/2012), Abhishek Auto Industries Ltd. vs. CIT (ITA No. 1433/Del/2009) have taken a view that RBI approval of the Royalty rates itself implies that the payments are at Arm's Length and hence no further adjustment needs to be made viewed from this angle too.

18. We, therefore, allow the grounds of the assessee with respect to ground no. 2.3 and 2.9 (i.e. the TPO erred m holding that no tangible benefits were derived by the

assessee out of royalty payments made by it and restricted the payment to 2% of net sales). We also allow the ground No. 2.9 of the assessee (i.e., transactions made under Royalty agreement approved by RBI are to be considered to be at arm's-length). We do not find the need to adjudicate the other Grounds namely. 2.4 to 2.8 raised by the assessee.

19. The next issue is with regard to non-granting of credit of Rs. 62,22,950 for the brought forward Minimum Alternate Tax (MAT paid by the assessee for A.Y. 2007-08.

20. The learned AR submitted that for the A.Y. 2006-07, as assessment was completed u/s. 115JB of the Act on 28.10.2010 determining the tax payable at Rs. 52,90,533 and hence it is eligible for MAT credit amounting to Rs. 42,83,132 (after set off of MAT credit amounting to Rs. 10,07,401 in the A.Y. 2008-09) when computing of its tax liability under the normal provisions of the Act. It is also submitted that the appeals of the assessee before various appellate authorities for earlier years are allowed, it would be eligible for set off of the balance brought forward tax credit amounting to Rs. 62,22,950.

21. We have heard the parties. We direct the Assessing Officer to examine the balance brought forward tax credit amounting to Rs. 62,22,950 and thereafter set off the same in accordance with law.

22. The next issue is with regard to computation of interest liability under sections 234C and 234D, which is

consequential in nature and, therefore, need not be adjudicated.

23. In the result, appeal of the assessee is partly allowed for statistical purposes.

24. Now we take up the Department's appeal in ITA No. 549/Hyd/2014 for A.Y. 2009-10. The Revenue raised the following grounds of appeal:

> 1. The order of the Hon'ble DRP is contrary to the law and is liable to be set aside.
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> 2. The DRP ought to have found that non-compete fee and marketing network rights are not similar in nature to know how patent copyright, etc., and the same cannot be treated as intangible assets and not eligible for depreciation u/s 32 of I. T. Act, 1961.
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> 3. The DRP ought to have relied on the decision of the Supreme Court in the cases of M/s. New Steel Equipment Pvt. Ltd vs. Collector of Central Excise and CIT vs. B. C Srinivas Setty wherein the intangible assets was clearly mentioned.
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> 4. The DRP ought not to have relied on the decisions of ITAT, Hyderabad in assessee's own case for AY 2000-01 & 2007-08, which further appeal is pending before Hon'ble High Court of Andhra Pradesh.

25. Ground Nos. 1 and 5 are general and we do not adjudicate the same. The remaining Grounds, ground Nos. 2 to 4 deal with the issue as to whether non-compete fees paid by the assessee company is eligible to claim depreciation at 25% or not.

26. We find that the DRP in the impugned assessment year 2009-10 held in favour of the assessee, as follows:

> *"Although, the Panel did not allow this claim in the assessee's case for AY 2007-08, by following the decision of the Hon'ble Jurisdictional Tribunal in the assessee's own case M/s. OCV Reinforcements Manufacturing Ltd. Vs. ACIT, 16(3), Hyderabad for the assessment years 2000-01 and 2006-07 vide orders dt. 29.5.2009 and 8.7.2011, the disallowance made by the AO towards depreciation on non-competing fee and marketing net work rights is hereby deleted and the AO is directed to allow the depreciation."*

27. We find no reason to controvert the findings of Hon'ble DRP which follows the decision of this Hon'ble Tribunal in AY 2000-01 (ITA No. 439/Hyd/2004), 2006-07 (ITA No. 1678/Hyd/2010) and AY 2007-08 (ITA No. 1976/Hyd/2011) in the assessee's own case vide orders dt. 29.5.2009, 8.7.2011 and 8.7.2013. Specifically we refer to the Tribunal decision in AY 2000-01 (ITA No. 439/Hyd/2004) which held as follows:

> *"8 At this juncture, we may appreciate the nature of non-compete fee. When a business is taken over, it involves consideration by way of a non-compete arrangements entered into by the parties to the takeover arrangement. The entity whose business is taken over undertakes not to carry on any activity in relation to the business taken over and not to share any know-how, patent, copyright, trademark, licence, franchise or any other business or commercial right of similar nature or information/technique likely to assist in the manufacture or process of goods or providing for services. For such an undertaking given in favour of the successor in business, a fee is paid by the entity taking over the business as consideration for such undertaking by the entity whose business is taken over. The same*

will be in addition to the consideration paid or payable for various tangible assets in the entity whose business is taken over. As per section 28 (va) of the Act, such non-compete fee is taxable in the hands of the recipient as profits and gains of business or profession with effect from 1-4-2003.

The argument of the revenue in this case that the non-compete fee is not an asset and it had no market value and it is not of the nature similar to know-how, patent, trade mark, licences, franchises, etc. So as to be eligible for depreciation, has no merit. As per Section 32 (1)(ii), two basic conditions are to be fulfilled. The first condition is that the item in question should be a business or commercial right and the second condition is that it should be of the nature similar to know-how, patents, copyright, trademark, etc., as mentioned in clause (ii) of section 32 (1) of the Act. It is not disputed that the payment made by the assessee company was to ward off competition from the entity from which business was taken over, on account of its engagement in similar line of business. Hence, it can be safely concluded that what was acquired by the assessee company by paying the fees is a business/commercial right. Once we agree that the payment is towards acquiring the business/commercial rights, now we will have to see whether such rights constitute an intangible asset or not. Section 32(1)(ii) of the Act extend the benefit of section 32 to intangible assets. The definition of the term 'intangible assets' is an inclusive one. In our view, the non-compete fee is an intangible asset which is bought by the assessee company, which falls within the scope of inclusive definition of the term 'intangible assets' and it is an item of similar nature like know-how etc. The principle of ejusdem generic will have to be applied for the definition of intangible assets in section 32(1) (ii) of the Act. The mention of specific items of the same group is followed by the expression of the general or residuary nature pertaining to

the same group, Words of a general nature following specific and particular words, should be construed as limited to things which are of the same nature as those specified. Applying this principle of construction, if the business or commercial right of a patent, trademark, license, franchise etc, fulfilled the condition of being intangible assets, then, in our considered view, the payment made by the assessee company towards non-compete fee also fulfilled the condition by way of a logical corollary, Hence, the non-compete right is eligible for depreciation under section 32 (1) (ii) of the act. As for the contentions of the Revenue based on the depreciation schedule provided in the Income-tax Rules, it is pertinent to mention here that when the provisions of the Act, discussed above, make the assessee eligible for depreciation in respect of an intangible asset, assessee has to be allowed the same, notwithstanding any ambiguity which the Income-tax Rules may give rise to, since the statutory legislation, viz., provisions of a statute prevail over the rules framed thereunder. Even in the subsequent years, the revenue allowed depreciation for the aforesaid intangible asset in the scrutiny assessment as well. Even though principles of res judicata have no application to income-tax proceedings, principle of consistency has to be respected and followed in identical facts and circumstances of the case, unless there are specific and valid reasons warranting any deviation from the view taken on a specific issue.

Similarly, payments made towards acquiring marketing network rights have also to be treated as payments made for acquiring commercial/ business rights akin to know-how, patent, trade mark, licences, franchises, etc. which are eligible for depreciation. Consequently, even with regard to payments made by the assessee for acquiring market network rights, assessee is entitled for depreciation. However, we uphold the rejection of the assessee's claim with regard to payment

made for goodwill, without going into merits of the matter, since the learned counsel for the assessee has not pressed for the grounds in relation to that issue.

In the light of the foregoing discussion, we set aside the impugned order of the CIT(A), and direct the assessing officer to allow the assessee's claim for depreciation on the payments made by the assessee by way of non-compete fee and for acquiring rights over market network.

28. Following this Tribunal's previous decisions for this very assessee in AY 2000-01 , AY 2006-07 & AY 2007-08 we uphold the findings of the DRP and thus Revenue's appeal is dismissed.

29. In the result, for A.Y. 2009-10, assessee's appeal in ITA No. 594/Hyd/2014 is partly allowed for statistical purposes and Revenue's appeal in ITA No. 549/Hyd/2014 is dismissed.

Pronounced in the open court on 13th October, 2014

Sd/-	Sd/-
(B. RAMAKOTAIAH)	(ASHA VIJAYARAGHAVAN)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Hyderabad, dated the 13th October, 2014
tprao

Copy to:

1. The Deputy CIT, Circle-16(1), 6th Floor, Aayakar Bhavan, Hyderabad.
2. M/s. Owens Corning Industries (India) Pvt. Ltd., 13-6-437/2C, Khaderbagh, Hyderabad-500 028.
3. The DRP, 2nd Floor, IT Towers, 10-2-3, AC Guards, Hyderabad-500 004.
4. The DR, A-Bench, ITAT, Hyderabad.