

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 2201 OF 2013

Commissioner of Income Tax-3 .. Appellant.
V/s.
M/s. Thyssen Krupp Industries India Pvt. Ltd. .. Respondent.

Mr. Ashok Kotangale with Mr. Arun Nagarjun and Mr. Sunil Sonawane
i/b.Padma Divakar, for the Appellant.
Mr. Madhur Agarwal with Mr. Atul Jasani, for the Respondent.

**CORAM: M.S.SANKLECHA AND
Dr. SHALINI PHANSALKAR JOSHI, JJ.
DATE : 2nd DECEMBER, 2015.**

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 27th November, 2011 passed by the Income Tax Appellate Tribunal (the Tribunal) for the Assessment Year 2007-08.

2 Mr. Kotangale, learned Counsel appearing for the Revenue urges the following re-framed questions of law for our consideration:-

“(a) Whether on the facts and the circumstance of the case and law, the Tribunal was justified in law in restricting the Transfer Pricing (TP) adjustment only to the transaction between the Associated Enterprises (AEs.)?”

(b) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in allowing the payment of royalty, project engineering and manufacturing drawing fees

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of Rs.11,27,16,302/- disallowed by the Transfer Pricing Officer (TPO).?

(c) Whether on the facts and circumstances of the case and in law, the Tribunal was justified in allowing the payment of liquidated damages of Rs.2,70,38,000/- disallowed by the TPO??"

3 **Re:- Question (a)**

- (a) The Respondent is in the business of execution of turnkey contracts involving design, manufacture, supply, erection and commissioning of sugar plants, cement plants, etc. During the subject Assessment Year, the Respondent-Assessee had International Transaction with its Associated Enterprises (AE) in respect of import of spares and equipments, royalty and project engineering, manufacturing drawings, settlement for liquidated damages and interest on delayed payments.
- (b) The TPO on selection of comparables arrived at the margin at 6.29% as against 5.19% arrived at by the Respondent-Assessee in its Form 3-CEB. However, the TPO proposed to make adjustment on account of enhancement of profit margin on all transactions of the Respondent-Assessee. This in spite of the Respondent-Assessee's objection to the application of the margin applicable to arrive at ALP at 6.29% on transactions with third party i.e. non-AE transactions. The Assessing Officer passed an order in accordance with the above order of the TPO.
- (c) Being aggrieved, the assessee carried the above issue in Appeal to the Tribunal. The Tribunal by the impugned order held that only

transactions entered into by an assessee with its AE are subject to transfer pricing adjustment and not otherwise. Thus, allowing the Assessee's appeal before it.

- (d) The grievance of the Revenue before us is that the adjustment is not to be restricted only in respect of transactions entered into with the AE. All the transactions of the Respondent-Assessee would have necessarily be varied/ adjusted by the margin arrived at by the TPO to arrive at the ALP.
- (e) We find that in terms of Chapter X of the Act, re-determination of the consideration is to be done only with regard to income arising from International Transactions on determination of ALP. The adjustment which is mandated is only in respect of International Transaction and not transactions entered into by assessee with independent unrelated third parties. This is particularly so as there is no issue of avoidance of tax requiring adjustment in the valuation in respect of transactions entered into with independent third parties. The adjustment as proposed by the Revenue if allowed would result in increasing the profit in respect of transactions entered into with non-AE. This adjustment is beyond the scope and ambit of Chapter X of the Act.

4 A similar view has been taken by this Court in Income Tax Appeal No. 1814 of 2013 (CIT v/s. M/s. Tara Jewels Exports Pvt.Ltd.) decided on 5th October, 2015 as well as by the Delhi High Court in CIT v/s. Keilin Panalfa Ltd. (ITA No.11/2015) decided on 9th September, 2015.

5 In the above view, as the provisions of the Act in respect of

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transfer pricing are self evident, Question No.(a) as proposed does not give rise to any substantial question of law. Thus, not entertained.

6 **Appeal admitted** on Question Nos. (b) and (c).

7 Registry is directed to communicate copy of this order to the Tribunal. This would enable the Tribunal to keep papers and proceedings relating to the present appeal available, to be produced when sought for by the Court.

(Dr. SHALINI PHANSALKAR JOSHI,J.)

(M.S.SANKLECHA,J.)

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