

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

ITA-125-2018

Date of Decision: 19.3.2019

Heidelberg Cement India Limited (formerly known as Mysore Cements Limited)

....Appellant.

Versus

Deputy Commissioner of Income Tax

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL.**

PRESENT: Mr. Himanshu Sinha, Advocate,
Mr. Ashim Aggarwal, Advocate and
Ms. Aushma Aggarwal, Advocate for the appellant.

AJAY KUMAR MITTAL, J.

1. This order shall dispose of two appeals bearing ITA Nos.125 and 127 of 2018 as according to learned counsel similar issues are involved therein. For brevity, the facts are being extracted from ITA-125-2018.

2. ITA-125-2018 has been preferred by the assessee under Section 260A of the Income Tax Act, 1961 (in short “the Act”) against the order dated 29.6.2017 (Annexure A-11) passed by the Income Tax Appellate Tribunal, Delhi Bench 'I-1', New Delhi (hereinafter referred to as “the Tribunal”) in ITA No. 1029/DEL/2015, for the assessment year 2010-11, claiming the following substantial questions of law:-

I. Whether the ITAT has grossly erred in failing to exercise its appellate jurisdiction and ordering a de

novo remand to the file of the TPO to decide on whether the combined transaction approach as adopted by the Appellant or the transaction by transaction approach should be considered for determining the ALP of the international transactions instead of deciding the same, despite all facts, evidence and material required for a decision being on record?

II. Whether the Impugned Order of the ITAT is untenable in the eye of law on account of its failure to adjudicate and give its finding in respect of all the grounds raised by the Appellant in its appeal?

3. Put shortly, the facts necessary for adjudication of the appeal as narrated therein may be noticed. The assessee is engaged in the business of manufacturing of cement and sells them to its customers in India. It filed its return of income on 12.10.2010 for the assessment year 2010-11 declaring the total income at ₹ 106,66,41,340/-. In the assessment year in question, the assessee entered into various international transactions with its Associated Enterprises (AEs) and submitted Form 3CEB (Annexure A-1) and disclosed the same in the transfer pricing documentation (Annexure A-2). The assessee clubbed the said transactions under one segment as they were closely linked to the business of manufacture of cement and used Transactional Net Margin Method (TNMM) as the Most Appropriate Method. It used operating profit/sales as the profit level indicator for benchmarking the transactions. For the purposes of benchmarking, the assessee used 3 years weighted average of 7 comparables and the operating

profit/sales was calculated at 16.87% while the operating profit/sales of the assessee was 17.37%. Since the operating profit/sales of 6 comparables using current year data was 14.93%, the transactions were at arm's length. As the assessee had entered into various international transactions with its AEs, a reference was made to the Transfer Pricing Officer (in short "the TPO") to determine the Arm's Length Price (ALP) of the transactions. The assessee filed written submissions dated 7.1.2014 and 23.1.2014 (Annexure A-3 Colly) before the TPO. The TPO vide order dated 29.1.2014 (Annexure A-4) passed under Section 92CA(3) of the Act proposed to make an adjustment of ₹ 3,78,80,000/- holding that the transaction pertaining to technical know-how fee should not be clubbed with the other transactions. The TPO determined the arm's length rate at 1.27% using by considering the comparables as specified in the external consultant report and additional comparables, i.e. ACC Limited, ACC Concrete Limited, Zuari Cement Limited and Shree Digvijay Cement Company Limited. Since the assessee had paid 1.67% on net sales, the TPO carried out an adjustment of ₹ 3,78,80,000/- to its total income. All other transactions of the assessee were found to be at arm's length. The Assessing Officer vide draft assessment order dated 13.2.2014 (Annexure A-5) added the said amount of ₹ 3,78,80,000/- to the total income of the assessee and framed the assessment at ₹ 110,45,21,340/-. Against the order, Annexure A-5, the assessee filed objections dated 19.3.2014 (Annexure A-6) before the Dispute Resolution Panel (hereinafter referred to as "the DRP"). The DRP vide order dated 14.11.2014 (Annexure A-7) rejected the objections filed by the assessee. Thereafter, the Assessing Officer framed the final assessment vide order dated 8.12.2014 (Annexure A-8) under Section 143(3) read with

Section 144C of the Act at a total income of ₹ 110,45,21,340/- and raised a demand of ₹ 1,60,75,830/- under Section 156 of the Act. Feeling aggrieved by the order, Annexure A-8, the assessee filed an appeal on 18.2.2015 (Annexure A-9) before the Tribunal. The assessee also filed synopsis dated 24.8.2016 (Annexure A-10) before the Tribunal. The Tribunal vide order dated 29.6.2017 (Annexure A-11) remanded the issue regarding aggregation of payment for technical know-how fee transaction back to the file of the TPO for fresh adjudication for the reasons that 'the appellant was required to provide to the TPO cogent evidence, backed by economic reasoning and business case that the transactions were intrinsically linked and had to be aggregated for benchmarking purposes and that the TPO had not provided a finding for rejecting the approach of the appellant of aggregating the closely linked transactions.' The other grounds were dismissed by the Tribunal being premature in nature with liberty to the assessee to re-agitate them once the issue of aggregation of transactions had been decided. Hence, the present appeals.

4. We have heard learned counsel for the assessee.

5. The only question raised in these appeals is whether the Tribunal was justified in remanding the issue regarding aggregation of payment for technical know-how fee transaction back to the file of the TPO for fresh adjudication.

6. The Tribunal after appreciating the factual and legal matrix, *inter alia*, noticed that as per the assessee, the transaction of payment of technical fees was required to be aggregated with other transactions whereas as per TPO, these transactions were required to be benchmarked separately as the same were not closely linked with the other transactions entered into

by the assessee. The main reason for clubbing the transactions under one segment was that it was closely linked to the business of manufacture of cement. The TPO had held that as payment for the services was a class of transaction of its own, therefore, the same required a separate benchmarking analysis and cannot be aggregated with the other transactions. Further, under Rule 10A(d) of the Income Tax Rules, 1962, 'transaction' includes a number of closely linked transactions. Under Section 92(1) of the Act, any income arising from 'an international transaction' was required to be computed having regard to arm's length price. More than one transaction can be taken together for determination of arm's length price only if they were closely linked. Aggregation of transaction or combined transaction approach is accepted practice for determination of arm's length price, however, such aggregation of transaction can be allowed if they were linked with each other. As per the transfer pricing study report, the only statement made by the assessee is that the assessee is engaged in the business of manufacturing the cement which is its primary business activity and therefore, all the transactions relating to cement manufacturing activity should be bundled together for determination of their ALP applying TNMM as the most appropriate method. The services rendered by the AE are specifically mentioned in the agreement. Therefore, there is no reason that such services cannot be evaluated independently on standalone basis.

7. The Tribunal also observed that it was the duty of the assessee to show with cogent evidence and factual analysis backed by economic reasoning and business that all the international transactions were originating from one source or they were independent or were part of package deal. Further, the TPO had not recorded any finding while

rejecting the claim of aggregating the transaction of the assessee. Accordingly, the Tribunal had rightly remanded the matter to the file of the TPO with a direction to the assessee to justify how international transactions were closely linked.

8. No illegality or perversity could be pointed out by the learned counsel for the revenue in the aforesaid findings recorded by the Tribunal in the appeals which may warrant interference by this Court. No question of law, muchless a substantial question of law arises in these appeals. Consequently, finding no merit in the appeals, the same are hereby dismissed. Needless to say that anything observed hereinbefore, shall not be taken to be an expression of opinion on the merits of the controversy.

(AJAY KUMAR MITTAL)
JUDGE

March 19, 2019
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(MANJARI NEHRU KAUL)
JUDGE

Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes/No