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

**INCOME TAX APPEAL NO. 324 OF 2018**

The Pr. Commissioner of Income Tax-1 ….. Appellant
Vs.
Thyssen Krupp Electrical Steel India Pvt. Ltd. ….. Respondent

Mr. Suresh Kumar, for Appellant.
None for the Respondent.

**CORAM: K.R.SHRIRAM, J &**
**FIRDOSH P. POONIWALLA, J.**

**DATED : JUNE 28, 2023**

**P.C.**

1. This appeal impugns an order dated 06/04/2017 passed by the Income Tax Appellate Tribunal, Pune ('ITAT') wherein the ITAT had upheld the order of CIT(A) deleting the addition/adjustment made by the Assessing Officer ('AO')/TPO ('Transfer Pricing Officer') on account of Arms Length Price ('ALP') of international transactions and dismissed Revenue's appeal.

2. Respondent is engaged in the business of manufacture of Low Carbon Cold Rolled Electrical & Mild Steel. Return of income for the Assessment Year 2005-06 was filed on 28/10/2005 declaring total income at Rs.43,68,70,518/- . AO completed the assessment under Section 143(3)

of the Income Tax Act, 1961 ('the Act'). Assessment order dated 18/12/2008 was passed on total income of Rs.49,96,88,040/- before set off of brought forward business loss and unabsorbed depreciation. In course of assessment, the AO referred the issue of international transactions entered into by respondent with its Associated Enterprises ('AE') to the TPO for determination of Arm's Length Price ('ALP'). Respondent had made export sales of Cold Rolled Electrical Steel in coils amounting to Rs. 12,95,67,447/- to its AE, TKES EBG Italia S.r.L, Italy. Before the TPO it was submitted by respondent that the said transaction of export sales were benchmarked by applying Cost Plus Method ('CPM method') as the same was considered to be the most appropriate method. However, for reasons discussed in detail in the order passed under Section 92CA(3) of the Act, the TPO held that Comparable Uncontrolled Price Method ('CUP method') is the most appropriate method for determination of the ALP of the export sales to the AE. Applying the CUP method, the TPO calculated the adjustment at Rs. 2,56,33,366/- on account of the ALP of the export sales to the AE. Respondent also received commission on sales amounting to Rs. 1,66,36,970/- from its AE, TKES Gmbh, Germany, for Sales Orders executed by TKES Germany in India. While respondent received commission @ 1.5% when the customer is other than original equipment manufacturer, it received 0.75% in case of original equipment manufacturer. By applying CUP method and comparing the Commission payments to respondent's agents by the Company itself @ 0.5% and 1% for different products, respondent contended that the commission earned by it from its AE is at arm's length. However, for reasons discussed in detail in the order of the TPO, he rejected the CUP method and applied internal rate of return for benchmarking the international transaction relating to commission income. This resulted in adjustment of Rs. 1,80,97,017/- on account of ALP of the transaction relating to receipt of Sales Commission from the AE. The total adjustment suggested by the TPO is Rs. 4,37,30,383/- (Rs. 2,56,33,366/- plus Rs. 1,80,97,017/-). In the assessment order passed on 18.12.2008, the AO made addition of Rs. 4,37,30,383/- as adjustment on account of ALP of the international transactions as determined by the TPO.

3. Against the assessment order, respondent filed Appeal to the Commissioner of Income Tax (Appeals)-1, Nashik on 23.01.2009. Vide order dated 12.09.2014, the CIT(A)-I, Nashik has deleted the addition of Rs. 4,37,30,383/- made by the AO/TPO as adjustment on account of ALP of the international transactions. In respect of export sales, the CIT(A) observed that the TPO has rejected the CPM method applied by respondent, without providing cogent reasons. The transactions considered as CUP by the TPO pertain to sale of small quantities of leftover stock and are in no way comparable to very large quantities sold to its AEs

in foreign countries. The CIT(A) observed that the transactions considered in CUP by the TPO are not in line with the provisions of Rule 10B and 10C of Income Tax Rules. In respect of the Commission receipt, the CIT(A) accepted respondent's contention that the method applied by TPO is inapplicable and also observed that the ITAT, Pune, has held in the case of [1]***Hoganas India Pvt. Ltd. Vs. DCIT*** that IPR method is not the correct method for benchmarking of commission receipt. The CIT(A) further observed that in subsequent years, i.e., Assessment Years 2006-07 to 2010-11, the TPOs have not disturbed the ALP of the international transactions reported by respondent. Accordingly, the CIT(A) deleted the addition of Rs.4,37,30,383/- made by the AO/TPO on this account.

4. Against the order of CIT(A)-I, Nashik, Revenue filed Appeal to the Income Tax Appellate Tribunal, Pune. Vide a common order dated 06.04.2017, the Income Tax Appellate Tribunal, Bench 'A', Pune has upheld the order of CIT(A) in deleting the addition of Rs. 4,37,30,383/- and has dismissed Revenue's appeal. In respect of export sales to AE, the ITAT observed that the CPM method had been accepted by the TPO for Assessment Years 2008-09 to 2010-11 and no adjustment has been made in the hands of respondent in those years. Therefore, ITAT found no merit in the order of TPO in applying the CUP method to benchmark the

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international transaction of export sales to AEs. In respect of the commission receipt from AE, the ITAT observed that respondent has also applied CUP method in the years 2006-07 to 2010-11. It is not the case of Revenue that respondent has received commission on different accounts in different years. In the succeeding years starting from Assessment Years 2006-07 to 2010-11, the TPO had applied CUP method. Therefore, the ITAT found no merit in the methodology adopted by the TPO in rejecting the method applied by respondent. Accordingly, the ITAT upheld the order of CIT(A) in deleting the adjustment of Rs. 4,37,30,383/- and dismissed Revenue's Appeal on this issue.

5. The following substantial questions of law have been proposed:

> A) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal is justified in upholding the order of CIT(A) in deleting the additions/adjustments of Rs.4,37,30,383/- made by TPO on account of Arms Length Price of International Transactions by way of Export Sales and Commission receipts?
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> B) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal is justified in upholding the CPM method adopted by assessee for benchmarking of Export Sales to AEs as against CUP method adopted by TPO and in upholding the CUP method adopted by assessee for benchmarking of Commission receipts as against Internal Rate Return (IRR) method adopted by TPO?

> C) Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal is justified in deleting the additions of Rs.4,37,30,383/- for assessment year 2005-06 relying on the method adopted by TPO in subsequent assessment years 2006-07 to 2010-11, ignoring the judicial decisions of Hon'ble Apex Court that in Income tax proceedings the principle of 'res-judicata' is not applicable ?

6. Respondent is not represented though served on 29/09/2017. This is evident from an affidavit of service filed by one Mr.Ganesh Ghorpade affirmed on 06/10/2017 for appellant.

7. With the assistance of Mr. Suresh Kumar, we have perused the impugned order.

8. The limited issue that arose before ITAT was to adjudicate on the methodology to be adopted while benchmarking the international transaction of respondent. Respondent had entered into two separate transactions with its AE; one was the export of manufactured steel items to AE and the second was receipt of commission from the AE. Respondent in the Transfer Pricing Study report while benchmarking transaction of export to AE had applied the CPM method for the year under consideration, i.e., Assessment Year 2005-06 and also for Assessment Years 2008-09 to 2010-11. The TPO was of the view that CUP method was most appropriate

method to be applied. Since the transaction picked up for comparison by TPO was very negligible, on the basis of small sales made by respondent of similar components, the CIT(A) held that there is no merit in applying the CUP method. CIT(A) also observed that the methodology adopted by respondent in applying CPM method had been accepted from Assessment Years 2008-09 to 2010-11 by the TPO himself and no adjustment has been made in the hands of respondent. The assessment orders for those assessment years are also on record. Therefore CIT(A) came to the conclusion, which was correctly upheld by the ITAT, that there was no merit in the order of TPO in applying the CUP method to benchmark the international transaction of export to AE in the hands of respondent.

9. While dealing with the second part of the transfer pricing adjustment made with regard to receipt of commission from the AE, respondent in Transfer Price report had applied the CUP method for benchmarking the international transactions with its AE. Respondent had applied CUP method in all the years starting from 2006-07 to 2010-11. The TPO for the assessment year under consideration, i.e., Assessment Year 2005-06 applied internal rate of return as the most appropriate method for benchmarking international transactions, but, in the succeeding years starting from Assessment Years 2006-07 to 2010-11, the TPO had applied CUP method. CIT(A), therefore has rightly rejected the methodology

adopted by TPO and ITAT has correctly upheld the findings of CIT(A).

10. In the circumstances, we find no case is made out for our interference. No substantial questions of law arise.

11. Appeal dismissed.

**(FIRDOSH P. POONIWALLA, J) (K.R.SHRIRAM, J)**