IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD 'A' BENCH : Hyderabad

(Through Video Conference)

Before Shri S.S. GODARA, Judicial Member
and
Shri L.P. SAHU, Accountant Member

ITA Nos. 825 & 826/Hyd./2016
Assessment Years: 2005-06 and 2010-11

Owens Corning Industries (India) Pvt.Ltd Hyderabad [Previously known as Saint Gobain Vetrotex India Limited]	vs.	Dy.CIT, Circle 3(1) Hyderabad
[PAN: AAACV9858N]		
(Appellant)		**(Respondent)**

For Assessee : Ms. Suchita Kanedia, AR
For Revenue: Sri Sunil Kumar Pandey, DR

Date of Hearing : 20/04/2021
Date of Pronouncement : 21/06/2021

O R D E R

PER S.S. GODARA, J.M.

These two assessee's appeals for A.Y. 2005-06 and 2010-11 arise against the CIT(A)-4 Hyderabad's orders dated 24.3.2016 and 23.03.2016, passed in case nos.0349/2015-16 and 0108/15-16 involving proceedings u/s 143(3) rw.s. 92CA(3) of the Income Tax Act, 1961 [for short 'the Act'].

Heard both the parties. Case files perused.

2. We notice at the outset that the assessee's identical sole substantive grievance in former AY 2005-06's appeal ITA 825/Hyd/16 and first

substantive grievance in latter A.Y. 2010-11's case ITA 826/Hyd/16 seeks to reverse both the lower authorities' action making arm's length price "ALP" adjustment on royalty payment to the tune of Rs.3,59,32,275/- and Rs.1,02,60,140/-@ 4% on net sales involving finished products; respectively.

Suffice to say, it emerges at the outset that we need not delve deeper in the relevant factual matrix on the impugned ALP adjustment pertaining to the impugned royalty issue. This is because of the fact that the CIT(A) has himself placed reliance on the tribunal's decision in assessee's case itself in AY 2009-10. His lower appellate discussion to this effect in A.Y 2005-06 reads as under.

> *6. During this assessment year, with regard to issue of royalty, the Transfer Pricing Officer's disallowed an amount of Rs. 3,59,32,175/-. As per the detailed discussion in the assessment order, the Assessing Officer disallowed this amount by following the Transfer Pricing Officer's order u/s 92CA(3) of the Act. The TPO disallowed Royalty @ 5% on the net sales of Rs. 71,86,45,501/- i.e., Rs. 3,59,32,275/- out of this the sales ~ AEs amounting to Rs. 4,28,95,840/-, with a reason that the Indian Entity is an extended arm of the appellant company and captive unit of the AE hence there is no necessity of payment of royalty.*
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> *7. I have carefully considered the submissions and assessment order. As per the details available and from the assessment order, it is observed that the appellant company during this assessment year has debited Rs. 3,59,32,275/- as royalty as per the schedule 18 of the P & L account. The appellant company paid Royalty to Saint Gobain Vetrotex, International, France, on net sales of Rs. 93,40,93,097/-. Out of these net sales amount, Rs. 4,28,95,840/- were sales made to the AEs i.e., M/s Saint Gobain Technical Fabrics America SA de CV. Mexico, M/s NSG Vetrotex KK, Japan, M/s Saint Gobain RF Services Pvt. Ltd., Australia, and Saint Gobain Vetrotex Deutschland GmbH, Deutschland. On the above Royalty payment, the Transfer Pricing Officer asked the appellant to explain why the royalty payment attributable to these sales made to AEs should not be disallowed. Therefore, after going through the appellant's reply, the Transfer Pricing Officer concluded that the royalty at 5% on the sales of Rs. 71,86,45,501/-*

is within the Arm's Length Range for all International transactions and so the royalty payment of Rs. 3,59,32,275/- disallowed. Since this issue is similar to that of A.Y. 2004-05. In this case, for the A.Y. 2004-05, the appeals were decided by me by following the Hon'ble ITAT decision in the appellant's own case for the A.Y. 2009-10, wherein the Hon'ble ITAT has decided that 4% of the net sales has to be allowed as royalty. Hence, following the same, the Assessing Officer is directed allow 4% of the net sales as royalty.

2.1. It next transpires that this tribunal's coordinate bench's decision in Revenue's and assessee's cross appeals ITA 549 and 595/Hyd/2014 dated 13.10.2019 for A.Y. 2009-10 has rejected the former's identical arguments as follows:-

"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 ie. 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, nontransferable 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 Coordinate 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).*
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> *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"

2.2. It is an admitted fact that the Revenue has himself not indicated any distinction on facts qua the instant royalty payment issue in all these assessment years. We adopt judicial consistency therefore and direct the

Transfer Pricing Officer "TPO" to recompute the impugned ALP adjustment afresh as per the tribunal's directions on the very issue in AY 2009-10 as per law. He shall further take note of his order dated 3.2.2009 in sec.154 rectification as well determining the impugned adjustment to the tune of Rs.21,44,79,792/- only. The assessee's instant sole grievance in former AY 2005-06 as well as the main appeal ITA 825/H/16 is accepted for statistical purposes. Its first and foremost substantive grievance in latter appeal ITA 826/Hyd/18 also follows suit.

3. The assessee's second substantive issue in latter AY 2010-11 appeal alleges that the CIT(A) has erred in law and on facts in restricting his grievance to the extent of Rs.31,78,180/- as against the debt claim of Rs.39,22,561/-; respectively. Both the learned Representatives agree that the instant issue involves more a reconciliation than any substantive adjudication. We thus restore the instant issue as well back to the file of Assessing officer for fresh factual verification as per law. The assessee's latter appeal ITA 826/Hyd/16 is also accepted for statistical purposes.

Both these assessee's appeals are allowed for statistical purposes in above terms. A copy of this common order be placed in the respective case files.

Order pronounced in Open Court on 21/06/2021.

Sd/-	**Sd/-**
(L.P. SAHU)	**(S.S. GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 21st June, 2021

*gmv

Copy of Order forwarded to:

1. Owens Corning Industries (India) Pvt. Ltd. [previously known as Saint Gobain Vetrotex India Limited], Hyderabad – Bangalore Highway, Thimmapur 509 325 Kothur Mandal, Mahaboobnagar Dt. Telangana State.
2. Dy.CIT, Circle 3(1), Hyderabad
3. ACIT, Range 16, Hyderabad.
4 CIT(A)-4, Hyderabad
5 Pr.CIT-4, Hyderabad.
6 D.R. ITAT Hyderabad
7 Guard File