* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **I.T.A. Nos.1068/2011 & I.T.A. Nos.1070/2011**

Reserved on: 22nd February, 2012
% *Date of Decision: 29th March, 2012*

CIT ..... Appellant
Through: Mr. Kamal Sawhney, Sr. Standing Counsel and Mr. Amit Shrivastava, Advocate

versus

EKL APPLIANCES LTD ..... Respondent
Through: Mr. V.P. Gupta, Mr. Bassant Kumar and Mr. Anuj Bansal, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest? Yes

R.V. EASWAR, J.:

In these appeals filed under Section 260A of the Income Tax Act, 1961 ('Act', for short) the Commissioner of Income Tax challenges the common order passed by the Income Tax Appellate

Tribunal ('Tribunal', for short) on 11.02.2011 for the assessment years 2002-03 and 2003-04.

2. The appeals arise this way. The assessee is a public limited company engaged in the business of manufacturing of refrigerators, washing machines, compressor and spares thereof and also trading all these items and microwaive ovens, dish washers, cooking ranges, air conditioners and spares thereof. In respect of the assessment years 2002-03 and 2003-04, it filed returns of income declaring losses amounting to ₹ 148,23,80,117/- and ₹ 1,14,59,660/- respectively. The Assessing Officer noticed that there were international transactions entered into by the assessee during the relevant previous years and accordingly invoked the provisions of Section 92CA(3) of the Act and referred the question of determination of the Arms Length Price ('ALP', for short) to the Transfer Pricing Officer ('TPO', for short). The TPO examined the matter in considerable detail and noticed that AB Electrolux, Sweden held 76% of the assessee's equity as on 31.03.2002 and out of the balance, 26% was held by the local joint venture partners and the balance 18% was held by the public. He noted that the turnover of the assessee for the assessment year 2003-04 amounted to ₹ 440.97 crores including trading sales of ₹ 48.29 crores pertaining to goods partly imported from the associated enterprises and also purchased

locally. The major international transactions undertaken by the assessee were also noticed by him and he has listed the same at page 2 of the order passed by him on 20.03.2006 under Section 92CA (3) of the Act. It is noticed from the order that there are 13 types of international transactions entered into by the assessee in the previous relevant year 2003-04. The TPO accepted all of them to be Arm's Length Transactions, except the payment of brand fee/ royalty of ₹ 3,42,97,940/-. The corresponding figure for the assessment year 2002-03 is ₹ 3,99,51,000/-. We may clarify that the revenue has filed before us the order passed by the TPO for the assessment year 2003-04 on 20.03.2006, but the order passed by the TPO for assessment year 2002-03 has not been made available. This, however, is not material because it is common ground that the facts and the controversy arising in both the assessment years are the same so far as the ALP is concerned. Reverting to the order of the TPO, he considered the payment of brand fee/ royalty by the assessee to the associated enterprise namely AB Electrolux, Sweden under an agreement dated 01.10.1998 to be unjustified.

3. It is necessary to narrate the order of the TPO on this aspect in some detail in order to appreciate the precise controversy. We have already noted that the brand fee payment was made under an agreement dated 01.10.1998. The assessee was to pay brand fee at

the rate of 0.50% of the net sales under the brand name of "Kelvinator". The payment was to be made to M/s. White Consolidated Inc. of Ohio, USA. However, the payment of the fee was waived till 01.01.2002 as advertising and launch support. On 27.09.2002, the agreement was modified to give effect to the new name of M/s. White Consolidated INC. It was thereafter known as Electrolux Home Products INC. The modified agreement also recognized the amalgamation of Electrolux Voltas Pvt. Ltd. with Electrolux Kelvinator Ltd. Another change made in the agreement was to change the brand fee to 1% of the net sales. The agreement was to remain in force till 31.12.2008. It was under this agreement that the assessee paid ₹ 3,42,97,910/- as brand fee for the assessment year 2003-04 and ₹ 3,99,51,000/- for the assessment year 2002-03.

4. The TPO obtained the financial statements of the assessee since the commencement of commercial production and examined the same and set out the crucial figures in the form of following table: -

Year	**Profit/ (loss) (Rs.)**	**Turnover (Rs.)**	**Brand fee/ Royalty (Rs.)**
1996-97	(23.4) cr	68 cr	3 lac
1997-98	(17.2) cr	215 cr	3.27 cr
1998-99	(8.19) cr	312 cr	6.78 cr

1999-2000	2.75 cr	298 cr	7.23 cr
2000-01	(39.5) cr	314 cr	6.64 cr
2001-02	(149.8) cr	481 cr	5.08 cr
2002-03	(195.1) cr.	428 cr	3.42 cr

5. From the figures shown above the TPO noticed that the assessee has been incurring huge losses year after year except for the financial year 1999-2000 and considering the perpetual losses, "the payment of royalty to the Associate Enterprise did not appear justified, as the technical knowhow/ brand fee agreements with A.E. had not benefited the assessee company in achieving profits from its operations". The TPO further noted that the assessee itself stopped the payment from 01.10.1998 till 01.01.2002 and thus "the justification for payment of brand fee during the year under reference becomes questionable".

6. Having reached the aforesaid conclusion, the TPO called upon the assessee to submit the justification for the payment of brand fee. The assessee submitted a detailed reply raising the following points:

(i) The payment of brand fee should be examined on merits for each year;

(ii) The Associated Enterprise ('A.E.', for short) had received similar brand fee from M/s. Fisher and Paykel Industries Limited, an unrelated party in New Zealand, and this transaction was comparable with the assessee's transaction with the A.E. and thus there cannot be any doubt regarding genuineness of the ALP;

(iii) The transaction was certified by M/s. Ernst and Young, the certification firm of global repute, who has stated that the fee paid by the assessee is lower than the uncontrolled brand fee;

(iv) The allowance of brand fee as expenditure does not depend on the profitability of the concern, but on the utility of the brand name and the technical knowhow in respect of which the payment is made. The payment may not immediately result in profits but since the company is in business with the motive to earn profit, it has to incur all such expenditure that would be in the interest of its business. The brand fee payment is a legitimate expenditure which, had it not been incurred, would have seriously affected the operations of the assessee. It would have hampered the availability of the brand name "Kelvinator".

(v) It was due to availability of the brand name that the assessee was able to achieve substantial increase in its turnover as shown in the table set out above. Had it not been for the brand name there would have been more losses because of higher fixed cost coupled with lower sales.

7. The TPO considered the reply of the assessee containing the justification for the payment of brand fee. He conceded that there was an increase in the turnover but observed that it has not resulted in any profit to the assessee. According to him, despite the payment of the brand fee for several years, the assessee has not been able to make a turnaround. He further held that the fact that the A.E. had charged similar brand fee from another company in New Zealand did not prove that the price paid by the assessee for obtaining the use of the brand name and the technical knowhow represented the ALP. He was of the view that the assessee had to demonstrate the actual benefit derived by it by using the brand name which it had failed to do. The continuous losses according to the TPO showed that the assessee did not benefit in any way from the brand fee payment. For these reasons, the TPO held that the brand fee payment made by the assessee to the A.E. was unjustified and the ALP of the transactions should be taken as nil. He accordingly held that the brand fee

payment of ₹ 3,42,97,940/- should be added back to the total income of the assessee.

8. A similar order would appear to have been passed by the TPO for the assessment year 2002-03 also by which the brand fee/ royalty payment on ₹ 3,99,51,000/- was added back to the income of the assessee.

9. Under Section 92CA (4) of the Act, the Assessing Officer is bound by the directions given by the TPO in respect of the ALP. Accordingly, the Assessing Officer, for both the years under appeal disallowed and added back the brand fee/ royalty payment made by the assessee to the A.E. while completing the assessments under Section 143(3) of the Act.

10. The assessee preferred appeals to the CIT (Appeals) in respect of both the assessment years and questioned the determination of the ALP and the disallowance of the brand fee/ royalty payment. The appeal for the assessment year 2002-03 was disposed of vide order dated 27.07.2009 whereas the appeal for the assessment year 2003-04 was disposed of by the order dated 27.11.2009. Though, two separate orders have been passed by the CIT (Appeals), the reasoning and conclusions are the same. We, therefore, proceed to notice the findings of the CIT (Appeals) in a consolidated manner.

Before the CIT (Appeals) the assessee would appear to have raised several objections including the objection to the reference made to the TPO which according to the assessee was done mechanically by the Assessing Officer. On this point the CIT (Appeals) found himself unable to agree with the assessee's objections, having regard to the judgment of this Court in the case of CIT v. Bankam Investment Ltd. (1994) 208 ITR 52. Thereafter he addressed the question whether the TPO was right in rejecting the economic analysis of the transaction undertaken by the assessee for the determination of the ALP vis-a-vis payment of royalty/ brand fee, in a situation where losses were being incurred continuously by it. He noted the assessee's economic analysis in great detail and recorded the following findings for the assessment year 2002-03: -

> (i) The assessee was forced to upgrade its technology with the advent of tough competition from makers of frost free refrigerators and large number of entrants in the refrigerator market. Once the technology was upgraded by clearing the usage of technical knowhow for payment of brand fee/ royalty the assessee was able to reduce the losses to a significant extent. Therefore, the claim of the TPO that by securing the use of the technical knowhow the assessee did not benefit was not correct;

(ii) There was significant increase in the operating losses on account of the increase in the employees' cost, finance charges, administrative expenses, depreciation and installed capacity. In this regard the comparative statement filed by the assessee to show the expenses over a period of 5 years, the assets acquired during the aforesaid period, the loans incurred over the said period, etc. was examined by the CIT (Appeals) who found that the statement supported the claim of the assessee regarding huge increase in the costs/ expenses. He also found that the acquisition by the assessee of other companies such as Intron Ltd. and Electrolux India Ltd. had also contributed to the losses;

(iii) From the schedule of unsecured loans furnished in the form of table over the period between 1999 to 2002, it is found that there was huge increase of financial costs from ₹ 5.12 crores in 1997 to 41.10 crores in 2002. This was solely on account of the increase in the unsecured loan from ₹ 15.89 crores to ₹ 397.92 crores in the year 2002;

(iv) Similarly, there was increase in the depreciation costs from ₹ 6.03 crores in 1997 to ₹ 67-88 crores in 2002 on

account of increase in the gross block of the assets from ₹ 46.81 crores in 1997 to ₹ 326.23 crores in 2002;

(v) The figures furnished by the assessee showed that though it was deriving gross profit from the operations, it was suffering losses due to expenses and other factors. The losses show significant reduction after technical upgradation in the year 2000. Therefore, it would not be inappropriate to state that the assessee started deriving significant monetary benefits due to the technical upgradation received under the collaboration agreement with the A.E.;

(vi) The OECD guidelines on Transfer Pricing Regulations require that business strategies are relevant for determining the comparability of prices between controlled and uncontrolled transactions. The TPO has disregarded the business and commercial realities and strategies and has acted in a mechanical manner ignoring the economic circumstances surrounding the transaction;

(vii) It is not open to the TPO to question the judgment of the assessee as to how it should conduct its business and regarding the necessity or otherwise of incurring the expenditure in the interest of its business. It is entirely the choice of the assessee

as to from whom it contemplates to source its technology or technical knowhow and as to what steps should be taken to meet the competition prevalent in the market and to stave off the competitors. This is the domain of the businessman and the TPO has no say in the matter. As held by the Supreme Court in ***S.A. Builders Ltd. v. CIT*** (2006) 289 ITR 26 (SC) the Revenue cannot justifiably claim to place itself in the arm chair of businessman or in the position of the Board of Directors and assume the role to decide how much is the reasonable expenditure having regard to the circumstances of the case.

In respect of the assessment year 2003-04 more or less the same findings were recorded by the CIT (Appeals). In fine, he held that the royalty/ brand fee payment for acquisition of use of technical knowhow was incurred for genuine business purposes and should be allowed even if the assessee had suffered continuous losses in the business. The losses are partly due to internal and external factors and according to the CIT (Appeals) it is difficult to "*subscribe to the TPO's view that if there was financial crunch then the appellant should have discontinued to payment to the A.E. on Brand Fee and the payment of royalty on acquisition of technical knowhow/ brand fee has not resulted in any financial benefit to the appellant*".

11. Thus for both the assessment years under appeal the CIT (Appeals) decided the issue in favour of the assessee. The Revenue preferred appeals before the tribunal for both the years. ITA No.4878/Del/2009 was the appeal for the assessment year 2002-03. The Tribunal after noticing the facts and the rival contentions in some detail, agreed with the decision of the CIT (Appeals) that the royalty/ brand fee payment was justified and held that the TPO was totally wrong in disallowing the same on the footing that the assessee suffered continuous losses.

12. For the assessment year 2003-04, the Revenue's appeal in ITA No.421/Del/2010 was dismissed by the Tribunal which held that the brand fee/ royalty payment cannot be disallowed by the TPO while determining the ALP. In doing so, the Tribunal followed its decision for the assessment year 2002-03 in the appeal filed by the department in ITA No.4878/Del/2009.

13. In ITA Nos.1068/2011 and 1070/2011 before us the Revenue has challenged the decision of the Tribunal by which it upheld the decision of the CIT (Appeals) deleting the disallowance of brand fee/ royalty payment for the assessment years 2003-04 and 2002-03 respectively while computing the ALP.

14. On the submissions made by both the sides, the following substantial questions of law are framed: -

ASSESSMENT YEAR 2003-04

> "Whether on the facts and in the circumstances of the case and on a proper interpretation of Section 92CA of the Act and Rule 10B(1)(a) of the Income Tax Rules, 1962, the Tribunal was right in confirming the order of the CIT (Appeals) deleting the disallowance of the brand fee/ royalty payment of ₹ 3,42,97,940/- made by the assessee to its Associated Enterprise, while determining the Arm's Length Price"?

ASSESSMENT YEAR 2002-03

> "Whether on the facts and in the circumstances of the case and on a proper interpretation of Section 92CA of the Act and Rule 10B(1)(a) of the Income Tax Rules, 1962, the Tribunal was right in confirming the order of the CIT (Appeals) deleting the disallowance of the brand fee/ royalty payment of ₹ 3,99,51,000/- made by the assessee to its Associated Enterprise, while determining the Arm's Length Price"?

15. It seems to us that the decision taken by the Tribunal is the right decision. The TPO applied the CUP method while examining the payment of brand fee/ royalty. The CUP method which in its expanded form is known as "comparable uncontrolled price" method is provided for in Rule 10B(1)(a) of the Income Tax Rules, 1962. It is one of the methods recognised for determining the ALP in relation to an international transaction. Rule 10B(1) says that for the

purposes of Section 92C(2), the ALP shall be determined by any one of the five methods, which is found to be the most appropriate method, and goes on to lay down the manner of determination of the ALP under each method. The five methods recognized by the rule are (i) comparable uncontrolled price method (CUP), (ii) re-sale price method, (iii) cost plus method, (iv) profit split method and (v) transactional net marginal method (TNMM). The manner by which the ALP in relation to an international transaction is determined under CUP is prescribed in clause (a) of the sub-rule (1) of Rule 10B. The following three steps have been prescribed: -

> "*(a) comparable uncontrolled price method, by which,*
>
> *(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;*
>
> *(ii) such price is adjusted to account for differences, if any, between the international transaction and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;*
>
> *(iii) the adjusted price arrived at under sub-clause (ii) is taken to be an arm's length price in respect of the property transferred or services provided in the international transaction;*"

16. The Organization for Economic Co-operation and Development ('OECD', for short) has laid down "transfer pricing guidelines" for Multi-National Enterprises and Tax Administrations. These guidelines give an introduction to the arm's length price principle and explains article 9 of the OECD Model Tax Convention. This article provides that when conditions are made or imposed between two associated enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises then any profit which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, if not so accrued, may be included in the profits of that enterprise and taxed accordingly. By seeking to adjust the profits in the above manner, the arm's length principle of pricing follows the approach of treating the members of a multi-national enterprise group as operating as separate entities rather than as inseparable parts of a single unified business. After referring to article 9 of the model convention and stating the arm's length principle, the guidelines provide for "recognition of the actual transactions undertaken" in paragraphs 1.36 to 1.41. Paragraphs 1.36 to 1.38 are important and are relevant to our purpose. These paragraphs are re-produced below: -

"*1.36 A tax administration's examination of a controlled transaction ordinarily should be based on the transaction actually undertaken by the associated enterprises as it has been structured by them, using the methods applied by the taxpayer insofar as these are consistent with the methods described in Chapters II and III. In other than exceptional cases, the tax administration should not disregard the actual transactions or substitute other transactions for them. Restructuring of legitimate business transactions would be a wholly arbitrary exercise the inequity of which could be compounded by double taxation created where the other tax administration does not share the same views as to how the transaction should be structured.*

1.37 However, there are two particular circumstances in which it may, exceptionally, be both appropriate and legitimate for a tax administration to consider disregarding the structure adopted by a taxpayer in entering into a controlled transaction. The first circumstance arises where the economic substance of a transaction differs from its form. In such a case the tax administration may disregard the parties' characterization of the transaction and re-characterise it in accordance with its substance. An example of this circumstance would be an investment in an associated enterprise in the form of interest-bearing debt when, at arm's length, having regard to the economic circumstances of the borrowing company, the investment would not be expected to be structured in this way. In this case it might be appropriate for a tax administration to characterize the investment in accordance with its economic substance with the result

that the loan may be treated as a subscription of capital. The second circumstance arises where, while the form and substance of the transaction are the same, the arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner and the actual structure practically impedes the tax administration from determining an appropriate transfer price. An example of this circumstance would be a sale under a long-term contract, for a lump sum payment, of unlimited entitlement to the intellectual property rights arising as a result of future research for the term of the contract (as previously indicated in paragraph 1.10). While in this case it may be proper to respect the transaction as a transfer of commercial property, it would nevertheless be appropriate for a tax administration to conform the terms of that transfer in their entirety (and not simply by reference to pricing) to those that might reasonably have been expected had the transfer of property been the subject of a transaction involving independent enterprises. Thus, in the case described above it might be appropriate for the tax administration, for example, to adjust the conditions of the agreement in a commercially rational manner as a continuing research agreement.

1.38 In both sets of circumstances described above, the character of the transaction may derive from the relationship between the parties rather than be determined by normal commercial conditions as may have been structured by the taxpayer to avoid or minimize tax. In such cases, the totality of its terms

> *would be the result of a condition that would not have been made if the parties had been engaged in arm's length dealings. Article 9 would thus allow an adjustment of conditions to reflect those which the parties would have attained had the transaction been structured in accordance with the economic and commercial reality of parties dealing at arm's length.*"

17. The significance of the aforesaid guidelines lies in the fact that they recognise that barring exceptional cases, the tax administration should not disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. It is of further significance that the guidelines discourage re-structuring of legitimate business transactions. The reason for characterisation of such re-structuring as an arbitrary exercise, as given in the guidelines, is that it has the potential to create double taxation if the other tax administration does not share the same view as to how the transaction should be structured.

18. Two exceptions have been allowed to the aforesaid principle and they are (i) where the economic substance of a transaction differs from its form and (ii) where the form and substance of the transaction are the same but arrangements made in relation to the

transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner.

19. There is no reason why the OECD guidelines should not be taken as a valid input in the present case in judging the action of the TPO. In fact, the CIT (Appeals) has referred to and applied them and his decision has been affirmed by the Tribunal. These guidelines, in a different form, have been recognized in the tax jurisprudence of our country earlier. It has been held by our courts that it is not for the revenue authorities to dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur. We may refer to a few of these authorities to elucidate the point. In ***Eastern Investment Ltd. v. CIT***, (1951) 20 ITR 1, it was held by the Supreme Court that "*there are usually many ways in which a given thing can be brought about in business circles but it is not for the Court to decide which of them should have been employed when the Court is deciding a question under Section 12(2) of the Income Tax Act*". It was further held in this case that "*it is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned*". In ***CIT v. Walchand & Co. etc.***, (1967) 65 ITR 381, it was held by the Supreme Court that in applying the test of commercial

expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue. It was further observed that the rule that expenditure can only be justified if there is corresponding increase in the profits was erroneous. It has been classically observed by Lord Thankerton in ***Hughes v. Bank of New Zealand***, (1938) 6 ITR 636 that "*expenditure in the course of the trade which is unremunerative is none the less a proper deduction if wholly and exclusively made for the purposes of trade. It does not require the presence of a receipt on the credit side to justify the deduction of an expense*". The question whether an expenditure can be allowed as a deduction only if it has resulted in any income or profits came to be considered by the Supreme Court again in ***CIT v. Rajendra Prasad Moody***, (1978) 115 ITR 519, and it was observed as under: -

> "*We fail to appreciate how expenditure which is otherwise a proper expenditure can cease to be such merely because there is no receipt of income. Whatever is a proper outgoing by way of expenditure must be debited irrespective of whether there is receipt of income or not. That is the plain requirement of proper accounting and the interpretation of Section 57(iii) cannot be different. The deduction of the expenditure*

cannot, in the circumstances, be held to be conditional upon the making or earning of the income."

It is noteworthy that the above observations were made in the context of Section 57(iii) of the Act where the language is somewhat narrower than the language employed in Section 37(1) of the Act. This fact is recognised in the judgment itself. The fact that the language employed in Section 37(1) of the Act is broader than Section 57(iii) of the Act makes the position stronger.

20. In the case of ***Sassoon J. David & Co. Pvt. Ltd. v. CIT***, (1979) 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income Tax Bill of 1961 was introduced, Section 37(1) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.

21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should

have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that *inter alia* finds expression in the OECD guidelines, in the paragraphs which we have quoted above.

22. Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/ brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been

incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorised.

23. Apart from the legal position stated above, even on merits the disallowance of the entire brand fee/ royalty payment was not warranted. The assessee has furnished copious material and valid reasons as to why it was suffering losses continuously and these have been referred to by us earlier. Full justification supported by facts and figures have been given to demonstrate that the increase in the employees cost, finance charges, administrative expenses, depreciation cost and capacity increase have contributed to the continuous losses. The comparative position over a period of 5 years from 1998 to 2003 with relevant figures have been given before the CIT (Appeals) and they are referred to in a tabular form in his order in paragraph 5.5.1. In fact there are four tabular statements furnished by the assessee before the CIT (Appeals) in support of the reasons for the continuous losses. There is no material brought by the revenue either before the CIT (Appeals) or before the Tribunal or

even before us to show that these are incorrect figures or that even on merits the reasons for the losses are not genuine.

24. We are, therefore, unable to hold that the Tribunal committed any error in confirming the order of the CIT (Appeals) for both the years deleting the disallowance of the brand fee/ royalty payment while determining the ALP. Accordingly, the substantial questions of law are answered in the affirmative and in favour of the assessee and against the Revenue. The appeals are accordingly dismissed with no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

MARCH 29, 2012
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