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

\+ **ITA 102/2014**

THE COMMISSIONER OF INCOME TAX-II ..... Appellant
Through: Mr. Shikhar Garg, Advocate for
Mr. Kamal Sawhney, Senior Standing counsel.

versus

LUMAX INDUSTRIES LIMITED. ..... Respondent
Through: Mr. Satyen Sethi, Advocate with
Mr. Arta Trana Panda, Advocate.

With

\+ **ITA 103/2014**

THE COMMISSIONER OF INCOME TAX-II ..... Appellant
Through: Mr. Shikhar Garg, Advocate for
Mr. Kamal Sawhney, Senior Standing counsel.

versus

LUMAX INDUSTRIES LIMITED ..... Respondent
Through: Mr. Satyen Sethi, Advocate with
Mr. Arta Trana Panda, Advocate.

With

\+ **ITA 104/2014**

COMMISSIONER OF INCOME TAX-II ..... Appellant

Through: Mr. Shikhar Garg, Advocate for
Mr. Kamal Sawhney, Senior Standing counsel.
versus

LUMAX INDUSTRIES LIMITED ..... Respondent
Through: Mr. Satyen Sethi, Advocate with
Mr. Arta Trana Panda, Advocate.

And

\+ **ITA 587/2014**

COMMISSIONEROFINCOMETAX ..... Appellant
Through: Mr. Shikhar Garg, Advocate for
Mr. Kamal Sawhney, Senior Standing counsel.

versus

LUMAX INDUSTRIES LTD. ..... Respondent
Through: Mr. Satyen Sethi, Advocate with
Mr. Arta Trana Panda, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R

% 28.10.2015

1. ITA Nos. 102, 103 and 104 of 2015 are appeals by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') against the impugned order dated 12th July 2013 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 6086/Del/2010 for the Assessment Year ('AY') 2005-06, ITA No. 5252/Del/2011 for the AY 2007-08 and ITA No. 4715/Del/2010 for the AY 2004-05 respectively. ITA No. 587 of 2014 is an appeal by the Revenue against the order dated 31st May 2013 passed by the ITAT in ITA No. 4456/Del/2012 for the AY 2008-09.

2. The facts leading to the filing of the present appeals are that the Respondent-Assessee is engaged in the business of manufacturing and sale of lighting products for automobiles. The Assessee entered into a

technical collaboration agreement with Stanley Electric Co. Ltd., Japan ('Stanley') in 1984 in terms of which the Assessee was granted a non-exclusive right and licence to manufacture and sell licensed products under Stanley's patents and technical information in India as well as outside India except Japan. Under the said agreement, the Assessee was to pay royalty on the sale of the licenced products on a fixed percentage. Initially the royalty was fixed at 4% and later on 2nd February 1990 was reduced to 3%. The agreement which was initially for 7 years has been renewed from time to time.

3. In 1994 Stanley acquired a 12.61% stake in the Assessee. According to the Assessee, it has been immensely benefitted from its collaboration with Stanley. Its turnover was Rs. 53 crores in AY 1994-95 and Rs. 230.08 crores in AY 2004-05. In AY 2005-06 its turnover was Rs. 294 crores. The Assessee states that it enjoyed a 60% market share of the Indian auto lighting industry. Another fact which has relevance and which has not been disputed is that the expenses incurred by the Assessee on account of payment towards royalties to Stanley for AY 1985-86 to 2003-04 has been allowed by the Revenue under Section 37 (1) of the Act as expenditure incurred wholly and exclusively for the purposes of business of the Assessee.

4. The Assessee states that during the previous years relevant to AYs 2004-05 and 2005-06, Stanley's stake amounted to 19.41% which was less than the minimum percentage of 26% which was necessary to make it an Associated Enterprise ('AE'). During this time the share of Indian promoters in the equity share capital of the Assessee was 39.06%. The remaining shares were held by public and financial institutions. However, on account of the presence of one Executive Director as the representative of Stanley on the Board of the Assessee, by virtue of Section 92A (2) of the Act, Stanley became an AE of the Assessee.

5. During AYs 2004-05 and 2005-06 the Assessee entered into the following the international transactions:

International transactions		
	2004-05	2005-06
Import of raw material	6,44,50,527	9,14,53,820
Import of capital equipment	62,50,907	7,86,59,617
Payment of royalty	2,03,02,776	2,68,77,737
Import of design and drawings	33,18,000	...
Payment of R&D expenses	.....	11,10,173

6. The Assessee filed its return of income for AY 2004-05 on 29th October 2004 showing income at Rs. 12,36,46,429 which was set off against the unabsorbed depreciation to the extent of Rs. 12,36,46,429. It

had computed book profits under Section 115-JB of the Act at Rs. 8,54,55,963. The return of the Assessee was picked up for scrutiny and notice was issued by the Assessing Officer ('AO') under Section 143 (2) of the Act on 28th April 2005.

7. As regards the computation for the purpose of Section 115-JB of the Act, the explanation offered by the Assessee for the expenses on account of the provision of retirement benefits was not accepted. The AO held that the Assessee had deliberately concealed particulars of income/filed inaccurate particulars of income so as to evade tax. On the aspect of payment of royalty and purchase of raw materials, which were international transactions, the AO made a reference to the Transfer Pricing Officer ('TPO') under Section 92CA of the Act.

8. The TPO by his report dated 15th December 2006 determined the Arms Length Price ('ALP') as regards the payment of royalty as Nil. After applying the Transactional Net Margin Method ('TNMM'), the TPO held that the formal agreement between the Assessee and Stanley could not be the basis for determining the ALP of royalty. It was observed that apart from drawings, the Assessee did not receive any technology. It was observed by the TPO that there was no need for any technology because Stanley's technical personnel were in full-time employment of the

Assessee. Further since the moulds, drawings and other raw materials had been purchased from Stanley, no further technology was required for manufacturing the auto lights. It was also observed that the Assessee's Engineers did not visit Japan for training. However, no separate addition on account of royalty was made because the adjustment under TNMM was more than the royalty payment.

9. The AO passed an assessment order dated 20th December 2006 on the basis of the aforementioned report of the TPO and made additions both on account of payment of royalty and disallowance of foreign travelling expenses.

10. The appeal by the Assessee against the said order was disposed of by an order dated 30th September 2010 by the Commissioner of Income Tax (Appeals) ['CIT (A)']. For AY 2004-05 the CIT (A) observed that the adjustment made on the basis of net profit margin of Phoenix Lamps Limited ('Phoenix') was not justified since Phoenix was situated in a Special Economic Zone ('SEZ') and as such, was enjoying certain benefits which were not available to the Assessee. It was also noticed that in the current AY 2006-07, the TPO itself did not consider Phoenix as a comparable case. Excluding Phoenix, operating profit of other comparable cases was 4.26% whereas operating profit of the Assessee

was 6.50%. Therefore, the CIT (A) held the payment of royalty was justified on the comparable uncontrolled price ('CUP') method. The additions were accordingly deleted.

11. As regards the disallowance of Rs. 2,59,434 on account of foreign travelling expenses, the CIT (A) held that the Director of the Assessee had undertaken visits for the purpose of business of the Assessee and therefore, the addition made on this ground is also not justified.

12. For AY 2005-06 also, a similar adjustment pursuant to the order of the TPO dated 10th October 2008 resulted in the CIT (A), by an order dated 26th November 2010, deleting the addition on account of royalty payment.

13. As regards AY 2007-08 the AO passed an order dated 17th October 2011 making a similar addition regarding payment of royalty on the basis of the report of the TPO as well as the order passed by the Dispute Resolution Panel dated 8th October 2010. This was taken up in appeal before the ITAT by the Assessee by filing ITA No. 5252/Del/2011. As regards AY 2008-09, the Assessee filed ITA No. 4456/Del/2012 before the ITAT against the final assessment order dated 17th July 2012.

14. The appeal for the AY 2008-09 was first decided by the ITAT by

order dated 31st May 2013. The ITAT allowed the appeal of the Assessee as regards adjustment on account of royalty for the following reasons:

> (i) The agreement with Stanley was not a paper agreement. The payment of royalty is about the trade mark, patent and technology in the technical collaboration agreement between the Assessee and Stanley since 1984.
>
> (ii) In terms of the agreement the Assessee was to pay royalty on its net sales, after deduction from the net sale price of the licensed products sold by it to Stanley. Although such payment was to be 4% on the net sales during the year, i.e. AY 2008-09, the royalty was paid @ 2.43% on the sale of licensed products, amounting to Rs. 218.08 crores. This is because the cost of standard imported components, standard local components and certain other deductions had been deducted from the net sales of Rs. 218.08 crores.
>
> (iii) In terms of Rule 10B (2) (c), contractual terms could not be given go-bye to determine ALP of the international transaction.

15. A similar approach was adopted by the ITAT in dealing with the appeals related to AYs 2004-05 and 2005-06. It was held that the Assessee had actually received technical assistance from Stanley. Further the employment of the expatriates of Stanley ensured that the technology provided was properly applied by the Assessee to the production of licensed products. Further, no mark-up on remuneration of expatriates

was charged by Stanley. It was also factually found that during AY 2004-05 technology in respect of the new models of Maruti, Honda was received. Merely because the Assessee had purchased moulds, designs, bulbs, sockets, lenses etc. from Stanley, it did not mean that the technology was not required. Importantly it was noticed by ITAT that for AYs 2004-05 and 2005-06 the entire sale (on which royalty was paid as a percentage) was made to Original Equipment Manufacturers ('OEM'). Therefore, had there been no collaboration agreement with Stanley, there would have been no sales to the OEM's which were in collaboration with Japanese companies. The ITAT also observed that the determination of ALP by the TPO in respect of payment of royalty at Nil did not refer to a comparable case.

16. On the question of addition made by the AO on account of ALP for the payment of royalty, learned counsel for the Assessee has rightly referred to the decision in ***Commissioner of Income Tax v. Sony Ericsson Mobile Communication (2015) 374 ITR 118*** where the determination of the ALP of the royalty paid as Nil was not approved. The Court's attention has also been drawn to the decision in ***Commissioner of Income Tax v. EKL Appliances Limited (2012) 345 ITR 241*** wherein it was held that Rule 10B (1) (a) did not authorize disallowance of any expenditure on the ground that it was not necessary

for the Assessee to have incurred such expense. It was observed that though the quantum of expenditure could be examined, the entire expenditure could not be disallowed on the ground that it was not necessary.

17. There is merit in the contention of learned counsel for the Assessee that once the TPO found that no adjustment was called for under the TNMM method, no adjustment could have been made by applying some other method as that would be contrary to Section 92C(1) of the Act.

18. The Court also finds that there is no justification for the TPO to come to the conclusion that the payment of royalty was not necessary in the present case particularly since the collaboration agreement between the Assessee and Stanley has been continuing since 1984. As held by the ITAT, after a detailed examination of the clauses of the collaboration agreement, the Assessee did receive full technical assistance from Stanley for which the royalty payment was made.

19. In the circumstances, the Court is not inclined to frame a question on the issue of deletion of the addition sought to be made by the AO for the AYs in question on account of ALP of the payment of royalty.

20. As regards the adjustment under Section 115JB on account of

provision for retirement benefits, the ITAT noted that the provision was made on the basis of actual valuation and was not a contingent liability. Reference was made to the decision in ***Bharat Earth Movers v. Commissioner of Income Tax (2000) 245 ITR 428 (SC).*** The order of the ITAT upholding the order of CIT (A) is not found to be perverse. The Court declines to frame a question on this issue.

21. The CIT (A) has deleted the disallowance of expenses on account of foreign trips of the Director of the Assessee after holding that the visits made to USA and Dubai were for the business purposes. The disallowance by the AO of the said expenses was found to be not justified. Since the above finding turned purely on facts, the order of the CIT (A) as affirmed by the ITAT, does not give rise to any substantial question of law.

22. On the issue of disallowance of the expenses on account of provision for warranty, the ITAT deleted it since the provision was made by the assessee based on actual warranty expenses incurred for the unexpired warranty period. As rightly pointed out by learned counsel for the Assessee the question is covered in its favour by the decisions in ***Rotork Controls Pvt. Ltd. v. Commissioner of Income Tax (2009) 314 ITR 62 (SC)*** and ***Commissioner of Income Tax v. Becton Disckinsion (2013) 29***

Taxmann.com 80 (Del). Therefore, no substantial question of law arises as regards this issue as well.

23. On the last issue concerning depreciation on computer peripherals @ 60%, learned counsel for the Revenue does not dispute that the question stands answered in favour of the Assessee by the decision in ***Commissioner of Income Tax v. BSES Rajdhani Power Limited (2013) 358 ITR 47 (Del).***

24. For the aforementioned reasons, no substantial question of law arises in any of these appeals. They are accordingly dismissed with no order as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

OCTOBER 28, 2015
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