IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'A', HYDERABAD

BEFORE SMT. P.MADHAVI DEVI, JUDICIAL MEMBER AND
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.461/Hyd/2015 : Assessment Year 2010-11

M/s. ZUARI Cement Limited, Yerraguntla, Kadapa Dist. **(PAN - AAACZ 1270 E)**	V/s	Asstt. Commissioner of Income Tax Circle 1(I/c) Kadapa
(Appellant)		(Respondent)

Appellant by	*:*	*Shri K.R.Vasudevan*
Respondent by	*:*	*Shri Konda Ramesh CIT-DR*

Date of Hearing	16.05.2016
Date of Pronouncement	05.08.2016

O R D E R

Per P.Madhavi Devi, Judicial Member :

This is assessee's appeal for assessment year 2010-11. In this appeal, assessee is aggrieved by the order passed by the Assessing Officer under S.143(3) read with S.144C of the Income Tax Act,1961.

2. Assessee has raised as many as 19 grounds of appeal and also additional grounds of appeal Nos.20 and 21. At the time of hearing, learned counsel for the assessee submitted that grounds No.1 and 2 are general in nature and need no specific adjudication.

3. As regards grounds No.3 and 4, it is submitted that they relate to the transfer pricing issue and more particularly the "most appropriate method" to be adopted for determination of the Arm's Length Price. The assessee has adopted TNMM while the TPO has

adopted CUP method. Grounds No.5 to 12 are against the various adjustments to be made for determination of the Arm's Length Price.

4. The learned counsel for the assessee submitted that these adjustments have been denied to the assessee by the TPO, and such denial has been confirmed by the Dispute Resolution Panel. He submitted that similar issue had arisen in assessee's own case for the assessment year 2009-10 and this Tribunal in ITA No.471 /Hyd/2014, vide order dated 17.4.2015, has considered the issue at length and had remanded the issue of determination of the Arm's Length Price to the Transfer Pricing Officer with certain directions. He submitted that following the same, for this year also, assessment needs to be remanded to the file of the Transfer Pricing Officer with similar directions.

5. The Learned Departmental Representative also confirmed that similar issues had arisen in assessee's own case for the earlier assessment year, but to keep the issue alive, he supported the orders of the lower authorities.

6. Having regard to the rival contentions and the material on record, we find that on similar issue, this Tribunal has considered the merits of the issue and has at paras 13 and 14 of its order dated 17.4.2015 held as under-

> "**13. We have considered the issue and pursued the evidences on record, including the documents placed on the Paper Books. We are of the opinion that the approach of the TPO is not correct. Even though the payments made by assessee to the AEs are just a fraction of the total turnover of assessee, these transactions are invariably inter-linked to the manufacturing and trading of cement by the assessee-company. Therefore, the approach of the TPO in considering the CUP method for analyzing independent transactions is not fully justifiable. Apart from that, the methodology used in various analysis is also faulty. As far as the royalty payment on sales is concerned, as rightly pointed out by the Ld.Counsel, there are no comparable companies which are offering similar services. The TPO's comparison on transactions of assessee subsidiary company**

much prior to the year under consideration cannot be justified. Therefore, on that basis itself, the comparison cannot be considered as an internal CUP. Moreover, the need for not charging royalty from SVCL was also explained as the subsidiary company was a sick company and in the process of reviving the company, assessee has not charged any royalty to its subsidiary company. Therefore, on FAR analysis, SVSL's past record with that of present transactions of assessee-company is not correct. Then, coming to external comparables, we were surprised to note that the TPO considered the technical fee payments without analyzing the nature of the payments. In some cases, it is royalty for acquiring the lime stone from Govt., which is not a 'royalty' for getting the technology from foreign AE. There is foreign exchange expenditure also considered as 'technical know-how fee'. A detailed objections of the assessee were not even considered or discussed either by the TPO or by the DRP. Therefore, on the basis of an external CUP ALP of 0.91% itself is not correct. Therefore, the entire exercise undertaken by the TPO on this issue is erroneous and cannot be justified.

14. Leave alone that amount, even the sub license fee for the use of trade mark is also faulty. Under the guise of TPO provisions, the TPO cannot determine the ALP at NIL as held by the Hon'ble Delhi High Court in the case of CIT Vs. EKL Applicances Ltd., (supra). Therefore, rejecting the entire payment without there being any analysis on the CUP method cannot be accepted. In the guise of analyzing the transactions in the CUP method, the TPO has not brought any evidence on record to reject the 1% payment made to Italcementi Group. Moreover, while determining the price at NIL on the issue, the TPO surprisingly holds that a ssessee has transferred its 'Zuari Brand' to 'Italcementi Group'. We are unable to understand this logic. Italcementi Group never obtained, acquired or used Zuari Brand anywhere in the world, so that this cannot be considered for Transfer Pricing analysis. It is the Italcementi Group brand which is used by assessee-company. The TPO's analysis of AMP expenses are also not correct. Even though Italcementi Group was being used from earlier years, AMP expenses of current year also included in this, which is not correct. Moreover, Italcementi Group itself is a 50% shareholder in the assessee-company from the beginning. Therefore, it cannot be stated that 'Zuari Cements' is exclusive brand owner of the Birla Group in exclusion of Italcementi Group. The entire approach by the TPO is biased and cannot be justified on the facts of the case. Therefore, we are not in a position to uphold any of the contentions raised by TPO in his order. Likewise, the disallowance of various service fees including reimbursements made by assessee to AE. Since we do not find any valid reason for TPO to disallow these expenditures, we have no other go than to set aside the entire order of the TPO which is based on wrong presumptions and propositions. DRP unfortunately, even though consisted of three senior officers, did not apply its mind to the valid objections raised by assessee. In view of this, without deciding the merits of various issues, we set aside the orders and direct the TPO to re-consider the entire order and analyse them in fresh, first by determining the most appropriate method and then analyzing the transactions under the provisions of the TP. The orders of the TPO/DRP on the TP issues are therefore set aside and the entire issue on TP analysis is restored to the file of AO for fresh consideration. The grounds raised are accordingly allowed for statistical purposes."

Respectfully following the said decision of the Tribunal, we remand the issue of "most appropriate method" to be adopted for the determination of the transfer pricing adjustment and also the various adjustments to be made for determination of Arm's Length Price to the file of the Assessing Officer. Grounds No.3 to 12 are therefore, set aside to the file of the TPO with similar directions. These grounds of appeal are accordingly treated as allowed for statistical purposes.

7. As regards grounds No.14 to 16, they are against disallowance of community development expenses, giveaways and contribution to Zuari School. Learned Counsel for the assessee submitted that these issues also had arisen in assessee's own case for the assessment year 2009-10 and the Tribunal, vide paras 4 to 6 of its order, cited supra, dated 17.4.2015 has dealt with the same.

8. The Learned Departmental Representative however supported the orders of the authorities below.

9. Having considered the rival contentions, we find that the Tribunal in assessee's own case for the assessment year 2009-10 has considered these issues and granted reliefs to the assessee on these issues, by observing in paras 4 to 6 of its order dated 17.4.2015, as under-

> "**4. As briefly stated, there are three expenditures which were disallowed by AO being contested by assessee in this appeal, whereas other disallowances made by AO are not objected. Among them, the first one is disallowance of Community Development Expenses of Rs.76,36,096/- being contested in Ground No.13.**
>
> **4.1 Assessee-company had incurred expenses of the above amount towards special activities like medical camps, installing water bores and bore-wells and carrying out infrastructure development in villages etc. AO disallowed the entire expenditure on the reason that:**

a) The expenditures were not supported by any concrete evidence;
b) The business necessity was also not proved beyond doubt;
c) Identity of payee was not established.

4.2 It was submitted that above expenditure has been incurred for the welfare of the employees and people in nearby villages and these are part of 'corporate social responsibility' expenditure of the company. It was submitted that assessee employs employees from nearby villages and these expenditures are necessary to retain such employees and motivate them to work with the company for a longer term by providing necessary amenities in the villages. These expenditures are essential for smooth operations and are incurred wholly and exclusively for the purpose of business. It was further submitted that assessee has maintained proper bills and documentation in support of the expenditures and AO has incorrectly disregarded sample voucher copies submitted. Assessee places reliance on the following judicial precedents wherein it has been held that expenditure incurred on various 'corporate social responsibility' is allowed as business expenditure.

i. CIT Vs. Madras Refineries Ltd., [266 ITR 170 (Madras)]
ii. CIT Vs. Jayendrakumar Hiralal [327 ITR 147 (Gujarat HC)]
iii. CIT & Anr. Vs. Karnataka Financial Corporation [326 ITR 355]
[(Kar. HC)]
iv. CIT Vs. Infosys Technologies Limited [360 ITR 714 (Karnataka)]

Assessee also relied on various ITAT decisions in support of the contention.

4.3 DRP however, accepted that this expenditure was incurred for the purpose of business which should be allowed u/s.37(1) of the Act. However, since AO has observed that no bills and vouchers were produced before him, it directed assessee to produce Books of Accounts including bills and vouchers and AO is directed to decide the issue on the basis of examination of the Books of Accounts.

4.4 As seen from the order, AO has examined few of the vouchers and came to conclusion that it does not contain proper invoices or vouchers and payee details are not available and in one case, even the amount of Rs.5 Lakhs was paid to Kadapa Ratnalu Trust. AO was of the opinion that the Trust was not recognized u/s.12AA. What is required to be examined by AO is whether amount was spent by assessee for providing necessary facilities to the villages/villagers under the 'corporate social responsibility' concept. It is not proper to disallow the entire amount on the basis of non-availability of few vouchers even though assessee has provided evidence by way of ledger accounts and payment details. AO does not have any right to disallow the amount stating that business necessity was also not proved beyond doubt. This issue was also decided by the DRP, so AO cannot again come to the same point which was held in favour of assessee. In view of this, we in the interest of justice, restore the issue to the file of AO to examine the vouchers only along with other Books of Accounts and other details to verify whether the expenditure was spent for the purpose of 'corporate social responsibility' of assessee-company which was allowed

as a business expenditure u/s.37(1) by the DRP itself. The ground is considered allowed for statistical purposes.

Giveaways:

5. The next item of disallowance is 'giveaways' to the tune of Rs.14,06,559/-. Under this head, AO disallowed an amount of Rs.14,06,559/- stating that this expenditure was not warranted and had no nexus with the business and not supported by concrete evidence and also no identity of receivers. We are unable to understand the above four reasons given by AO. If we pursue the orders, it is very clear that expenditure was incurred for purchase of gifts to advocates marriages, purchase of coolers gifted to Joint Director (Mines), purchase of gifts to M.V.Mysoora Reddy's son's marriage function, purchase of silver plate gifted to Inspector of Factories, purchase of gifts to Railway employees, purchase of gift for ESI official daughter's marriage, purchase of gifts to other Govt. employees etc. Except the purchase of gold coins from Corporation Bank, Bangalore on 16-02-2008 for Rs.3,85,166/- vide Invoice No.120 for which no details were furnished, rest of the expenditure has same identity etc. Since the business necessity was already decided by the DRP, AO's duty is only to examine the vouchers. In our opinion, except the amount of Rs.3,85,166/- for which details were not available, rest of the expenditure cannot be disallowed on the reasons stated by AO. We therefore, direct the AO to allow the expenditure, except the amount of Rs.3,85,166/-. This ground is partly allowed.

Contribution to Zuari School:

6. The last item is the expenditure incurred in the nature of contribution to Zuari School amounting to Rs.13,43,496/-. As per the copy of the MOU entered between assessee and DAV College Trust and management society, New Delhi, assessee-company was required to reimburse the expenditure on running the school after deducting the income realized as fees etc., from the students. AO, however, noticed that 'school' was not defined in the MOU and disallowed the expenditure stating that there is no clarity in the MOU itself. We were surprised about the reasoning given by the AO. He was directed by the DRP only to examine the necessary vouchers, AO should not question the wisdom of the DRP in allowing the expenditure u/s.37(1), subject to verification of the availability of vouchers. In our opinion, AO exceeded his jurisdiction in examining the MOU itself. Not only that, assessee also made contributions to another school at Sitapuram. This was being contributed earlier by SVCL which was later merged with assessee company. In both the places of Yerraguntla and Sitapuram, the school is being run mainly for the benefit of employees. Since, the DRP already decided to allow the expenditure u/s.37(1) and assessee furnished the vouchers, the reasons assigned by AO to disallow the expenditure cannot be accepted. We direct the AO to allow the expenditure. In the result, this ground is allowed.

Respectfully following the same, in this appeal also, ground no.14 is allowed for statistical purposes, ground no.15 is partly allowed and ground no.16 is allowed.

10. As regards ground No.17 relating to disallowance of additional claim of depreciation on goodwill, the learned counsel for the assessee submitted that the assessee had raised additional objection before the Dispute Resolution Panel with regard to the claim of depreciation on goodwill and the DRP, after considering the judicial precedents on the issue and also the judgment of the Hon'ble Supreme Court in the case of Smif Securities Ltd. (348 ITR 302) has directed the Assessing Officer to arrive at the correct value of goodwill in the light of the judgment of the Tribunal at Mumbai in the case of DCIT Vs. Toyo Engineering India Ltd. in ITA No.3279/Mum/2008, if the fair value of assets of the 'SVCL' is less than the consideration of amalgamation, the difference between the two should be considered as the amount incurred for 'goodwill', and accordingly, the correct amount of depreciation will be calculated. We find that the assessee company amalgamated with Sri Vishnu Cements Ltd.(SVCL), a company whose principal business is to produce and manufacture all kinds of Portland Cement, including pozzolana cement. Both the companies are merged with effect from 1.1.2007 pursuant to the scheme of amalgamation sanctioned by the Hon'ble High Court of Andhra Pradesh on 29th June, 2007. The goodwill amounting to Rs.17975.03 lakhs arose as a result of merger and subsequently, the amount was increased by Rs.16.95 lakhs as additional purchase consideration was paid. The assessee has recognized such goodwill in its books of accounts with effect from 1.1.2007 and claimed depreciation on such enhanced goodwill. We find that the DRP has taken into consideration the fact that the assessee had not claimed depreciation on such goodwill, while filing return of income from

2007-08 to 2011-12, but since the law is clear by virtue of the judgment of the Hon'ble Supreme Court in the case of Smifs Securities Ltd., DRP has directed the Assessing Officer to allow the same after verification of the claim of goodwill. This being a factual finding and in accordance with the law as settled by the judgment of the Hon'ble Supreme Court, we do not see any reason to differ from the directions of the Dispute Resolution Panel. However, it is seen that the Assessing Officer, while giving effect to the directions of the DRP, has not allowed the additional depreciation. In fact, there is no discussion about the same in the assessment order. The Assessing Officer is, therefore, directed to give effect to the directions of the DRP. This ground of the assessee is accordingly treated as allowed.

11. Grounds no.18 and 19, being against levy of interest under S.234B, we find that these two grounds are consequential and the Assessing Officer is directed give relief, if any, to the assessee in accordance with law.

12. Additional grounds no.20 and 21 raised by the assessee are against the claim of balance 50% of the additional depreciation under S.32(1)(iia) not allowed in the earlier A.Y. and against the disallowance of the claim of provision for site restoration fund respectively.

13 Brief facts relating to additional ground on claim of additional depreciation, are that the assessee had claimed additional depreciation on new plant and machinery acquired, at 50% in the earlier A.Y. as they same were used for less than 180 days and Finance Bill of 2015 had clarified the position that additional depreciation on plant and machinery used for less than 180 days or more has to be allowed, if it has not been allowed in the year of acquisition and installation of such plant and machinery, in the

immediately succeeding previous year. In view of the provision introduced under S.32(1)(iia) of the Act by the Finance Bill of 2015, the assessee is now claiming additional deprecation by way of filing this additional ground of appeal

14. Though the Learned Departmental Representative has opposed the admission of the additional ground of appeal on this issue, on the ground that the facts are not on record and it is not a legal issue, we find that the relief is being claimed by the assessee because of the provision introduced by the Finance Bill of 2015 and the facts with regard to the clam of depreciation on the plant and machinery are on record. What the assessee is now claiming is additional depreciation not allowed in the year of acquisition and installation. Therefore, we see no reason for denying the admission of the ground. We, therefore, admit the additional ground and remit the same to the file of the Assessing Officer with a direction to verify the facts as to the percentage of depreciation allowed in the year of acquisition and installation and if the assessee is eligible for the additional depreciation of 50% by virtue of the Finance Bill of 2015, the same may be allowed. This ground is accordingly treated as allowed for statistical purposes.

15. As for ground no.21 for the claim of provision for site restoration fund amounting to Rs.88,30,000, it is stated by the assessee that this fund was inadvertently added back by the assessee in the computation of income, while fling the return of income for the assessment year 2010-11, and the same was missed by the assessee to be claimed before the lower authorities, and that the same may be admitted and adjudicated upon.

16. The Learned Departmental Representative however, objected to the admission of this additional ground as well on the ground that the assessee has not made any claim with regard to such

fund in the return of income and therefore, it cannot be raised at this stage. We find that this additional ground of appeal also deserves to be admitted in view of the decision of this Tribunal in the case of NMDC reported in 68 SOT 199. However, the issue involved in this ground, not being before the authorities below, needs verification as to facts. In view of the same, we deem it fit and proper to admit the said ground of appeal and remand the matter to the file of the Assessing Officer for reconsideration in accordance with law and judicial precedents on the issue. This ground is also treated as allowed for statistical purposes.

17. Now taking up ground No.13, which is against disallowance of additional depreciation on the plant and machinery of Rs.55,77,10,527, brief facts are that the Assessing Officer passed the draft assessment order under S.144C of the Act, wherein he observed that the assessee has produced books of account, vouchers and on perusal of which, it was found that out of the additions made to the fixed assets of Rs.764,59,36,549, the assessee has furnished supporting evidences to the tune of Rs.185,27,31,474 only and that vide letter dated 24.3.2014, assessee's representative has produced sample copies of the invoices. The Assessing Officer asked the assessee to submit complete invoices but the assessee's representative submitted that since documents are voluminous, he is not able to produce the same. The Assessing Officer, however, was not satisfied with the version of the assessee, and disallowed the depreciation on the balance of the additions made to the fixed assets, and consequently made an addition of Rs.114,04,86,479.

18. It is now stated by the Ld. Counsel for the assessee that both the Assessing Officer as well as the DRP have not dealt with the issue properly, but the Assessing Officer, in the assessment order

passed under S.143(3) read with S.144C of the Act, had considered the issue of disallowance of depreciation of Rs.11,404,26,479 and observed that the assessee has claimed additional depreciation at the rate of 20% on the assets acquired during the year less than180 days and out of the additions made, the assessee acquired assets worth Rs.527,71,05,271 on 30th and 31st March, 2010. He observed that the additional depreciation is available only on new machinery, also, only when it is put to use. He observed that the machinery itself was purchased on 30th and 31st of March, and it cannot be put to use immediately, as it requires time for installation. Therefore, following the decision of the Chennai Bench of the Tribunal in the case of Brakes India Ltd. (144 ITD 0403), Assessing Officer disallowed additional depreciation claimed by the assessee at 50% of 20% on the ground that the assets were not put to use even for less than 180 days since they were acquired only on 30th and 31st of March.

19. Learned counsel for the assessee submitted that the Assessing Officer has allowed regular depreciation on the same assets, while disallowing additional depreciation holding that the assets were purchased only on 30th and 31st of Mach of the relevant financial year, and therefore, they were not put to use. He submitted that this is a contradictory finding of the Assessing Officer in respect of the same assets, and therefore, the same has to be set aside for reconsideration.

20. The Learned Departmental Representative submitted that the Assessing Officer has rightly pointed out that the assets were purchased only on 30th and 31st March, and therefore sufficient time was not there for the assessee to install the machinery and also to use the same to be eligible to claim additional depreciation thereon. Thus, according to him, the assessment order needs no interference

21. Having regard to the rival contentions and the material on record, we find that the Assessing Officer has allowed normal depreciation on the very same assets, and has thus impliedly accepted that the said assets were acquired and put to use before the end of the relevant financial year. That being so, the Assessing Officer cannot take a contrary view, while considering the claim of additional depreciation. In view of the same, we deem it fit and roper to remand this issue also to the file of the Assessing Officer to verify the records, and if the depreciation is allowed under S.32, additional depreciation shall also be allowed on the same reasoning.

22. In the result, assessee's appeal is treated as partly allowed.

Pronounced in the open court on 05th August, 2016

Sd/-	**Sd/-**
(S.Rifaur Rahman)	**(P.Madhavi Devi)**
Accountant Member.	**Judicial Member**

Dt/- 05th August, 2016

Copy forwarded to:

1. M/s. ZUARI Cement Limited, Krishna Nagar, Yerraguntla, Kadapa District
2. Asst. Commissioner of Income Tax, Circle 1(I/C), Kadapa
3. Dispute Resolution Panel Hyderabad
4. Director of Income Tax, International Taxation, Hyderabad
5. Departmental Representative ITAT, Hyderabad

B.V.S.