आयकर अपीलीय अधिकरण "K" न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

श्री पी.एम. जगताप, लेखा सदस्य **एवं** विवेक वर्मा; न्यायिक सदस्य के समक्ष ।

BEFORE SHRI P.M. JAGTAP, AM AND SHRI VIVEK VARMA, JM

आयकर अपील सं./I.T.A. No.6823/Mum/2011

(**निर्धारण वर्ष /** Assessment Year : 2006-2007

Asstt. Commissioner of Income Tax – 2(3), Room No. 556, 5th floor, Aayakar Bhavan, Mumbai – 20.	**बनाम**/ Vs.	M/s Welspun Zucchi Textiles Ltd., Trade World, 'B' Wing, 9th Floor, KamlaMills Compound, Senapati Bapat Marg, Lower Parel, Mumbai – 400 013.
		स्थायी लेखा सं./PAN : AACW2067L
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

आयकर अपील सं./I.T.A. No.7371/Mum/2010

(**निर्धारण वर्ष /** Assessment Year : 2006-2007

M/s Welspun Zucchi Textiles Ltd., Trade World, 'B' Wing, 9th Floor, KamlaMills Compound, Senapati Bapat Marg, Lower Parel, Mumbai – 400 013.	**बनाम**/ Vs.	Asstt. Commissioner of Income Tax – 2(3), Room No. 556, 5th floor, Aayakar Bhavan, Mumbai – 20.
स्थायी लेखा सं./PAN : AAACW2067L		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by	Shri Mourya Pratap
Revenue by :	Shri Ajeet Kumar Jain

सुनवाई की तारीख /**Date of Hearing : 17-2-14**

घोषणा की तारीख /**Date of Pronouncement : 28-2-14**

आदेश / O R D E R

PER P.M. JAGTAP, A.M. :

पी.एम. जगताप, लेखा सदस्य

These two appeals, one filed by the assessee being ITA No. 7371/Mum/2010 and the other filed by the Revenue being ITA No. 6823/Mum/2011, are cross appeals for A.Y. 2006-07.

2. The issue involved in ground No. 1 of assessee's appeal relates to the addition of Rs. 1,61,00,696/- made by the A.O. to the total income of the assessee by way of transfer pricing adjustment in respect of the international transactions of the assessee company with its AE involving export of bathrobes.

3. The assessee in the present case is a company which is a joint venture between Indian Promoters (major being Welspun India Ltd.) and Viccnzo Zucchi S.P.A., Italy. It is engaged in the business of manufacture and export of bathrobes. The return of income for the year under consideration was filed by it on 31-10-2007 declaring total income of Rs. 1,30,65,646/-. In the said year, the assessee had exported bathrobes to its AE located in Italy for an amount of Rs. 18,55,51,843/-. In the TP study report filed by the assessee, these international transactions were bench marked by the assessee by following CUP method. It was stated that 85.52% of the total sales of the assessee were to its AE while the remaining sale/export were made to non-AEs. It was stated that the export to non-AE was mainly comprising of export of bathrobes to Main Knitting Inc. U.S.A at a unit price of US $ 6.55 while the sale price charged by the assessee for export of bathrobes to its AE in Italy was US $ 8.42. It was claimed that the price charged by the assessee to its AE for export of bathrobes was more than the price charged for similar bathrobes

to its non-AE and the same therefore was at arm's length. This claim of the assessee was not found acceptable by the TPO. According to him, the assessee had compared the average price of bathrobes exported to its AE located in Italy with the average price of bathrobes exported to the non-AE located in USA. He held that both these markets were different and even the comparison made by the assessee by taking average price of bathrobes was not proper. He therefore rejected the CUP method followed by the assessee for bench marking and proceeded to bench mark the transactions of the assessee company with its AE by following TNMM as the most appropriate method with Operating Profit to Total Cost (OP/TC) as the Price Level Indicator (PLI). In this regard, he made a search on capitaline database and selected seven entities engaged in the manufacture of Terry Towels as comparables. Since the average profit margin of these seven comparables worked out at 15.32% by taking arithmetic mean was more than the profit margin of 8.65% earned by the assessee, the TPO adopted the average profit margin of 15.32% of the comparables as the arm's length margin. In this regard, he rejected the contention of the assessee that the DEPB benefit from exports should also be taken into consideration as the part of sale proceeds to determine its profit margin. Accordingly, applying the average profit margin of 15.32% of the comparabled to the total cost of the assessee related to its exports to AE, the arm's length value of the exports of bathrobes of the assessee to its AE was determined by the TPO at Rs. 20,16,52,539/- as against the value of Rs. 18,55,51,843/- charged by the assessee and the difference of Rs. 1,61,00,696/- was treated as TP adjustment required to be made in the case of the assessee.

4. In the draft assessment order, the A.O. proposed to make the addition on account of TP adjustment in respect of the international transactions of the assessee company with its AE involving export of bathrobes as determined by the TPO. On receipt of the draft assessment order, the assessee company

raised its objection before the DRP. The DRP, however, did not find the objections raised by the assessee to be sustainable keeping in view that a similar issue involving the TP adjustment made by the A.O. and confirmed by the ld. CIT(A) was pending before the Tribunal in assessee's own case for A.Y. 2005-06. Accordingly, the A.O. was directed by the DRP to pass the final assessment order making therein the addition on account of TP adjustment as proposed in the draft assessment order. The A.O. thereafter passed a final assessment order u/s 143(3) r.w.s. 144-C of the Income Tax Act, 1961 vide an order dated 30-9-2010.

5. We have heard the arguments of both the sides and also perused the relevant material available on record. It is observed that a similar addition made by the A.O. on account of TP adjustment in assessee's own case for A.Y. 2005-06 was deleted by the ld. CIT(A) and the Tribunal vide its order dtd. 11-1-2013 passed in ITA No. 898/Mum/2010 upheld the order of the ld. CIT(A) deleting the said addition for the following reasons given in para 17:-

> "17. After considering the rival submissions and perusing the relevant material on record, it is observed that the DEPB benefit was not taken into consideration by the AO/TPO for the purpose of working out the profit margin of the assessee whereas such benefit was taken into account in the comparable cases while working out their profit margin as found by the learned CIT(Appeals). Before us, nothing has been brought on record to controvert or rebut this finding recorded by the learned CIT(Appeals) and this being so, we find no justifiable reason to interfere with the decision of the learned CIT(Appeals) that the DEPB benefit received during the year under consideration should be considered as part of the turnover of the assessee for working out the profit margin to make the comparison of like to like and similar to similar. Since the profit margin of the assessee after taking into consideration the DEPB benefit as part of its turnover comes to 12.30% as against the average net profit margin of 13.05% of the comparables which is within the safe limit of 5%, we find ourselves in agreement with the learned CIT(Appeals) that no TP adjustment in respect of transactions made with the associated enterprises was required to be made in the case of the assessee. We, therefore, uphold the impugned order of the learned CIT(Appeals) deleting the addition made by the AO by way of TP adjustment and dismiss the appeal of the Revenue."

Respectfully following the order of the co-ordinate Bench of this Tribunal in assessee's own case for A.Y. 2005-06 (supra), we restore the similar issue involved in the year under consideration to the file of the A.O. with a direction to recompute the profit margin of the assessee company after taking into consideration the DEPB benefit as a part of its turnover and to delete the addition made by way of TP adjustment if the difference between the profit margin so computed and the average profit margin of the comparables is found to be within the safe harbor limit of 5% as claimed by the assessee. Ground No. 1 of the assessee's appeal is accordingly treated as allowed.

6. As regards the other grounds raised by the assessee in its appeal as well as all the grounds raised in the Revenue's appeal, it is observed that the issues taken therein are arising from the order of the ld. CIT(A)-6, Mumbai dtd. 21-7-2011 whereby he disposed of the appeal filed by the assessee against the final order passed by the A.O. on 30-9-2010 u/s 143(3) of the Act as per the directions issued by the DRP u/s 144-C of the Act.

7. At the time of hearing before us, the ld. D.R. has raised a preliminary objection that the order passed by the A.O. u/s 143(3) of the Act as per the direction of the Dispute Resolution Panel was not an appealable order before the ld. CIT(A) and the ld. CIT(A) thus had no power to entertain and dispose of the appeal filed by the assessee against the said order. He has contended that the impugned order passed by the ld. CIT(A) disposing of the appeal filed by the assessee against the order passed by the A.O. u/s 143(3) of the Act in pursuance of the directions of the DRP thus is liable to be quashed. The ld. Counsel for the assessee, on the other hand, has not raised any material contention to meet this preliminary objection raised by the ld. D.R.

8. After considering the rival submission and perusing the relevant material available on record, we find that the order of assessment passed u/s

143(3) of the Act in pursuance of the directions of the DRP is not considered as an order appealable before the ld. CIT(A) w.e.f. 1-10-2009 as per the amendment made in the relevant provisions of section 246-A of the Act by the Finance (No.2) Act, 2009. The appeal filed by the assessee against the order passed by the A.O. u/s 143(3) of the Act on 30-9-2010 in pursuance of the directions of the DRP thus was not maintainable before the ld. CIT(A) and the ld. CIT(A) clearly exceeded his jurisdiction in entertaining and disposing of the said appeal filed by the assessee. We, therefore, hold that the impugned order of the ld. CIT(A) disposing of the appeal filed by the assessee against the order passed by the A.O. u/s 143(3) in pursuance of the directions of the DRP is not valid in the eye of law and the same is liable to be cancelled. We order accordingly.

9. In the result, the appeal of the assessee is treated as partly allowed while the appeal of the Revenue is allowed.

Order pronounced in the open court on 28th Feb. 2014.

आदेश की घोषणा खुले न्यायालय में दिनांकः 28-2-2014 को की गई ।

Sd/-	sd/-
(VIVEK VARMA)	(P.M. JAGTAP)
न्यायिक सदस्य JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated **28-2-2014**

व.नि.स./ RK , Sr. PS

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)—Concerned, Mumbai.
4. आयकर आयुक्त / CIT – concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai K Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai