

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

BEFORE SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER
AND
SHRI. S. JAYARAMAN, ACCOUNTANT MEMBER

I.T(TP)A No.397/Bang/2015
(Assessment Year : 2010-11)

M/s. Sasken Communication Technologies Ltd,
139/25, Domlur Ring Road, Domlur,
Bengaluru 560 071 .. Appellant
PAN : AA ECS6424R

v.
Deputy Commissioner of Income-tax,
Circle - 6(1)(1), Bengaluru .. Respondent

I.T(TP)A No.376/Bang/2015
(Assessment Year : 2010-11)
(By the Revenue)

Assessee by : Shri. Padam Chand Khincha
Revenue by : Smt. Priscilla Singsit, CIT -DR I

Heard on : 25.07.2016
Pronounced on : 21.10.2016

ORDER

PER S. JAYARAMAN, ACCOUNTANT MEMBER :

These are cross appeals filed by the assessee and the Revenue respectively, against the order of the DCIT, Circle -6(1)(1), Bengaluru, dt.27.03.2004, for the A. Y. 2010-11.

02. The assessee, Sasken Communication Technologies Ltd, with its headquarters in Bengaluru, and offices in Pune, Chennai, Hyderabad, China, Germany, Japan, Sweden, UK, USA and South Korea, is a provider of

telecommunication software services and solutions to network equipment manufacturers, mobile terminal vendors and semiconductor companies around the world. Sasken delivers end-to-end solutions that enable richer content delivery on next generation networks. It has received interest on loans from its AEs, as per the details as under :

Name of the AE	Amount of balance	Rate of interest	Interest received
Sasken Mexico	154,01,000	4.61%	1,14,603
Sasken Inc	17,24,50,125	3.24%	20,52,720

The assessee has benchmarked this transaction against the LIBOR using the CUP method. The six monthly US LIBOR is taken at 0.79% as against which it has received @4.61% and 3.24% interest, respectively, which are higher. Hence, these transactions were considered by the assessee to be at arm's length.

03. However, the TPO considered corporate bonds issued by the companies in India as against the government bonds for comparability of the interest rate earned. The TPO further relied upon the safety level of the corporate bonds based on the grading issued by CRISIL and considered the loans given by the assessee similar to corporate bonds falling within the grade of BB to D . The TPO was of the view that the risks in the loans given were too high for the company and considered the same to be in the grade

of BB and corresponding interest rate was computed @14.74 percent and accordingly, Rs.2,67,68,300/ was added to the assessee's ALP. The DRP confirmed said addition.

04. Thereafter, the assessee filed a rectification petition dt.10.02.2014 before the TPO submitting, inter alia , that the AO computed interest on loan on an average / closing balance as on 31.03.2010. The loan to Sasken Mexico was received in June 2009 and there was no balance outstanding on March, 2010. Therefore, interest is required to be computed only for the period April 1, 2009 to June 11, 2009 and enclosed the computation in Annexure-A. in respect of Loan to Sasken Inc, it submitted that the loan amount was released at different point of time during FY 2009-10. It was not given on the first day of financial year as assumed by the TPO. Hence, it pleaded that that the interest on loan computed by him was erroneous and enclosed a detailed computation in Annexure-A mentioning the actual dates of loan disbursements. Further, it submitted that without prejudice to its contention that the benchmark for interest on USD loans provided to wholly owned foreign subsidiaries should be LIBOR, the interest computed by the TPO considering ALP at 14.74% should be Rs. 1,00,98,044/- as against Rs. 2,67,68,300/- computed by TPO and the net adjustment u/s 92CA being ALP interest rate @14.74% as determined by TPO should have been at Rs.79,30,721/- (1,00,98,044 minus 21,67,323, interest received and offered to tax in return) only as per its annexure A. However, the TPO in his order

u/s.92CA(5) r.w.s. 154, dt.10.03.2014 rejected the petition stating that the closing balance of loan were not furnished / not available at the time of passing the TP order and hence the assessee's submission cannot be considered as a mistake apparent from record. The effective grounds of the assessee are extracted as under :

Ground no.3.1 :

"The lower authorities have erred in determining and making adjustment u/s.92CA of the Act amounting to Rs.2,46,00,977/- in respect of interest earned on loan given to Sasken Inc and Sasken Communication Technologies Mexico S. A DE CV (for short "Sasken Mexico"). The entire basis of making impugned adjustment, inter alia, by relying on information obtained from M/s. CRISIL Ltd u/s.133(6) OF THE Act without giving an opportunity to rebut and to cross examine the parties is contrary to the principles of natural justice, bad in law and consequently the TP adjustment determined amounting to Rs.2,46,00,977/- is to be deleted in entirety.

3.2 Without prejudice, the learned AO has erred in not considering the transfer pricing order rectified under section 92CA(5) r.w.s 154 of the Act dated 10.3.2014 and erred in adding back Rs.2,67,68,300/- (instead of Rs.2,46,00,977/-)."

05. The Ld. AR submitted that its main objections to the TPO's proposal was that Sasken was a debt-free company, the loans provided were from internal funds. Sasken India earns mostly in foreign currency with 80% of its sales and some of the domestic sales being in foreign currency. As per the newly introduced Safe Harbour rules by the CBDT, the prescribed ALP rate is the base rate of SBI if the loan to Indian subsidiaries outside India is in Indian currency. All these facts are acknowledged by the TPO in his

order. Relying on this tribunal decisions in Sami Labs Ltd v DCIT, IT(TP)A no 1358/ Bang/2011 dt 04.12.2015 & Indegene Lifesystems P Ltd v ACIT , 2015 60 taxmann.com28 , he pleaded that the impugned loan to its AEs were out of its own funds , not out of borrowed funds, the loans are given in US dollars, interest was received in Indian rupees and when such transactions between it and its AEs are in international transactions ,the ratio of the above cases ie the transaction would have to be looked upon by applying commercial principles in regard to international transaction and in such cases the domestic prime lending rate would not have applicability and the international rate fixed being LIBOR would come into play.

06. We have considered the submissions. On the facts and circumstances of the case, we are of the considered opinion that the issue requires to be examined by the TPO afresh in the light of the above materials and the ratios and accordingly remit the issue to the TPO.

07. Apart from the above TP addition, the A O made the following disallowances on Corporate Tax matters:

- i) Disallowance u/s.14A at Rs.1,28,29,387/-.
- ii) The addition of Rs.16,43,07,085/- under the caption 'Excess deduction u/s.10A /10AA is on account of two factors, viz.,
Exclusion of royalty income from profits of 10A / 10AA units, for the reason that the said income is not derived from export of computer software and consequently not eligible for deduction u/s.10A / 10AA of the Act.

Exclusion of foreign currency expenses, additional telecommunication expenses and insurance expenses from export turnover while computing deduction u/s.10A / 10AA of the Act.

08. On the issue no 1 ,supra, ie on disallowance u/s.14A at Rs.1,28,29,387/-, the AO found that the assessee was in receipt of dividend of Rs.3,90,24,858/- which is an exempt income. The assessee attributed Rs.1,16,773/- i.e., 23% of salary at Rs.4,67,092/- paid to Senior Executive Treasury as the expenses incurred towards earning this income. The AO found that only direct expenses on employees / directors by way of salaries, staff welfare, travelling, communication etc., is considered by the assessee towards disallowance. Various other expenses on corporate establishment are left out as non allocable expenses. As against reserves and surplus of Rs.450.33 crores at the year end, the AO found that Rs.328.57 crores was in investment. So the AO held that the investment is the key function of the corporate office and the management would certainly devote more time to safeguard the earnings deployed in these investments. So he considered that the assessee's workings of 2% of corporate expenses is not fair , invoked Rule 8D r.w.s.14A and disallowed Rs.1,28,29,387/-.

09. On an appeal, the DRP, inter alia, found that assessee's submission is not based upon any tangible evidence in the sense that it has not maintained any separate accounts with regard to investments, the income from which is exempt. It merely denied to have incurred any expenditure

vis-a-vis investment made for earning tax-free dividend income even though no such exempt income is earned during the year. It would be fair to note that investment decisions are complex in nature and a company is run by its Board of Directors and the business and investments are managed by key personnel, executives etc., for which experts are often consulted. The very existence of a corporate entity and its structure requires an administrative establishment which require incurring of multifarious expenses including establishment, general and administrative expenses. It held that the case laws relied upon by the assessee cannot rescue it in-as-much as it has not maintained any accounts as mandated in section 14A(2)(3) and such an inaction on the part of the assessee cannot automatically shift the burden to the AO which is otherwise placed upon the assessee at the first instance. In this view of the matter, the Panel found no merit in the arguments of the assessee and held that the provisions of section 14A are attracted in this case and that the working of the disallowance made by the AO as per Rule 8D is in order. Panel also held that this is also in accordance with the circular No.5/2014 of CBDT.

10. Before us, the AR pleaded that the disallowance made under section 14A read with rule 8D(2)(iii) at Rs. 1,28,29,387/- has been made without demonstrating the incorrectness of the claim of the assessee that it has not incurred any expenditure towards earning exempt income. The said disallowance is therefore bad in law. Further, it

was submitted that no effort is required to receive the dividend. Pointing out the relevant portion of the Income Tax Simplification Committee's report on the disallowance of expenditure incurred in relation to income not includible in total income under section 14 A of the Act, the Hon'ble Finance Ministers Budget Speech Relying on 29.02.2016 under para 167 which read as under :

"Another issue which has led considerable number of disputes is quantification of disallowance expenditure relatable to exempt income in terms of section 14 A of the Income Tax Act, I propose to rationalize the formula in Rule 8D governing such quantification. The said rule is being amended to provide disallowance will be limited to 1% of the average money value of investments yielding exempt income , but not exceeding the actual expenditure claimed."

The AR invited our attention to the notification dt 02.6.2016 on the amendment made to the Rule 8D. Then he pleaded that in accordance with the ratio of the SC in CWT v Sharvan Kumar Swamp & Sons 76 Taxman 620 that this Rule should be applied in its case as it was intended to impart uniformity and to avoid vagaries and disparities resulting from application of different modes of valuation , being procedural law and hence applicable to all pending cases.

11. We have considered the submissions. On the facts and circumstances of the case, we are of the considered opinion that the

issue requires to be examined by the AO afresh in the light of the above amendments and accordingly remit the issue to the AO.

12. On issue no 2, supra, i.e., in respect of the addition of Rs.16,43,07,085/- under the caption 'Excess deduction u/s.10A /10AA', the assessee's effective grounds are extracted as under :

5 **Grounds relating to exclusion of royalty income from profits eligible for deduction under section 10A and 10AA of the Act**

5.1 The learned AO has erred in excluding royalty income amounting to Rs.13,15,59,000/- from the profits eligible for deduction under section 10A/10AA of the Act without appreciating the fact that the royalty income constitutes profits of the business of the STPI units / SEZ units and consequently the same is eligible for deduction under section 10A and 10AA of the Act.

6 **Grounds relating to reduction of telecommunication charges, insurance charges and foreign currency expenses from export turnover while computing deduction under section 10A of the Act**

6.1 The learned AO has erred in excluding foreign currency expenditure of Rs.75,84,00,000/-, telecommunication expenses of Rs. 2,21,28,489/- and insurance charges of Rs.54,03,600/- from the export turnover in the process of computation of deduction under section 10A of the Act.

6.2 Without prejudice, the learned AO (while giving effect to the DRP directions) has erred in reducing the cumulative expenditure (i.e., foreign currency expenditure, telecommunication expenses and insurance charges) of Rs.78,58,32,089 (instead of 78,59,32,089) from total turnover while computing deduction under section 10A of the Act.

7 **Grounds relating to reduction of telecommunication charges and insurance charges from export turnover while computing deduction under section 10AA of the Act**

7.1 The learned assessing office has erred in reducing an additional sum of Rs 48,20,047/- towards telecommunication expenses and insurance charges of Rs 24,54,840/- from export turnover while computing exemption under section 10AA of the Act.

8 **Grounds relating to unit wise computation of deduction under section 10A/10AA of the Act**

8.1 The learned assessing officer has erred in not making unit wise computation of deduction under section 10A/10AA of the Act. On facts and in the circumstances of the case and law applicable, the learned assessing officer be directed to make unit wise computation of deduction under section 10A/10AA of the Act.

12.1 In this regard, the AR submitted that although the DRP directed the AO to follow the ratio of the decision of Hon'ble Karnataka High Court in CIT v. Tata Elxsi Ltd [349 ITR 98], it had not given specific directions in respect of exclusion of royalty income from profits of STPI and SEZ units and exclusion of foreign currency expenditure, additional telecommunication and insurance expenses from export turnover although the assessee raised such issues before the DRP. The assessee filed a petition under Rule 13 of the IT (DRP) Rules, 2009, requesting the DRP to give specific directions in respect of the above mentioned objections. The DRP vide its order dt. 07.09.2015, inter alia, held although the assessee raised the above issues viz grounds 7,8 &10, however the DRP has not issued any direction on such issues. It held that the rectification under rule 13 of DRP rules read with

Section 144C can not be equated with section 154 as the scope under section 154 is "entire order", whereas the subject matter of rectification under rule 13 of DRP rules is only the direction (s) issued within the specified time. After such specified time, the DRP can not issue fresh directions and held that the request for rectification is not tenable and accordingly dismissed the petition filed by the assessee under Rule 13 of the Rules. It is pleaded that in the following decisions, it has been held that royalty income constitutes profits of the business of 10A units and consequently eligible for deduction under section 10A.

- (i) Wipro Ltd v DOT [2005] 96 TTJ 211 - 1TAT Bangalore
- (ii) CIT v Wipro Ltd - ITA 3204 of 2005 - Karnataka HC - 28.2.20 12
- (iii) CIT v Wipro Ltd - TTA 507 of 2002— Karnataka HC - 25.8.20 10
- (iv) CIT v Wipro Ltd - ITA 503 of 2002 - Karnataka HC - 1.9.20 10
- (v) CIT v Motorola India Electronics P Ltd - Karnataka HC - 11.12.2013

And in the following decisions, it has been held that expenses incurred in foreign currency expenses should not be reduced from export turnover while computing deduction under section 10A.

- (i) CIT v Motor Industries Co Ltd - Karnataka HC - 13.6.20 14
- (ii) CIT v Mphasis Ltd - Karnataka HC - 1.8.2014
- (iii) Sasken Communication Technologies Ltd v DCIT - ITAT Bangalore - 4.3.20 15 —AY 2004-05, 2006-07 & 2008-09
- (iv) CIT v Kshema Technologies Ltd - Karnataka HC - ITA No. 703/2009 - 8.1.2016.

13. We have considered the above submissions. On the facts and circumstances of the case, it is clear that neither the AO has examined these issues properly nor they received due attention at the hands of the DRP. In view of that we are of the considered view that the above issues are required to be adjudicated by the AO afresh in the light of the above ratio and if the facts are similar to apply the above ratios accordingly and hence these issues are also remitted to the AO .

14. The next issue is on short credit of TDS. In this regard assessee submitted that since the AO has not allowed TDS credit to the extent of Rs.14,08,748/- (Rs.15,56,38,180/- as claimed in the return of income minus Rs.15,42,29,432/- as allowed in the final assessment order), TDS credit should be fully allowed as claimed in the return of income.

14.1 We find that the DRP has directed the AO to verify the credit from the record, vis-à-vis, the claim made by the assessee and give credit to it accordingly. We direct the AO to give credit to the amount claimed by the assessee.

15. In the next ground, the assessee has challenged the levy of interest u/s.234B of the Act, which is only consequential. AO is directed to give consequential relief to the assessee.

IT(TP)A.No.376/Bang/2015 : Revenue's appeal :

16. The grounds of appeal taken by the Revenue are as under :

1. The directions of the Dispute Resolution Panel are opposed to law and facts of the case.
2. On the facts and in the circumstances of the case the Dispute Resolution Panel erred in directing the AO to reduce expenses incurred in foreign currency expenses, telecommunication expenses, insurance charges and other expenses in foreign currency both from export turnover and as well as from total turnover for the purpose of computation of deduction u/s 10A of the Income tax Act without appreciating the fact that the statute allows exclusion of such expenditure only from the Export turnover by way of specific definition of export turnover defined in the Act and there is no specific provision in section 10A warranting exclusion of above expenses from the total turnover also.
3. On the facts and in the circumstances of the case the Dispute Resolution Panel erred in directing the AO to compute deduction u/s 10A in the above manner by placing reliance on the decision of Hon'ble High Court of Karnataka in the case of M/s Tata Elxsi Ltd., which has not become final since the same has not been accepted by the Department and SLPs are pending before the Hon'ble Supreme Court.

16.1 We find that the DRP had followed the judgment of Hon'ble jurisdictional High Court in the case of Tata Elxsi Ltd v. CIT [349 ITR 98], in directing exclusion of items deducted from export turnover from total turnover also for working out the deduction u/s.10A of the Act. Just for the

reason that appeal has been filed by the Revenue against the judgment of jurisdictional High Court would not be a reason not to follow the jurisdictional High Court's judgment. We do not find any lacunae in the order of the DRP .In the result, appeal of the Revenue stands dismissed.

17. In the result, the appeal of the assessee is allowed for statistical purposes and the appeal of the Revenue is dismissed.

Order pronounced in the open court on 21st day of October, 2016.

Sd/-

Sd/-

(SMT. ASHA VIJAYARAGHAVAN)
JUDICIAL MEMBER

(S. JAYARAMAN)
ACCOUNTANT MEMBER

MCN*

Copy to:

1. The assessee
2. The Assessing Officer
3. The Commissioner of Income Tax
4. The Commissioner of Income Tax (A)
5. DR
6. GF, ITAT, Bangalore

By Order

Assistant Registrar