

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

Both these appeals are by the assessee challenging imposition of penalty u/s 271(1)(c) of the Act amounting to Rs.,17,82,080/- and Rs.8,02,37,398/- respectively.

2. During hearing of these appeals, the ld. counsel for the assessee, Shri Dhanesh Bafna, contended that quantum appeal has been sent back to the file of the ld. Assessing Officer, therefore, the penalty may be deleted. On the other hand, the ld. DR, Shri Sunil K. Jha, strongly objected to the plea of the assessee on the ground that the penalty appeal may also be sent to the Assessing Officer.

2.1. We have considered the rival submissions and perused the material available on record. Before coming to any conclusion, we are reproducing hereunder the relevant portion from the order of the Tribunal dated 07/03/2014, in the case of assessee itself, on quantum addition, ITA No.6562 /Mum/2009, ITA No.219/Mum/2010 and ITA No.8892/Mum/2010 (Assessment year 2007-08) for ready reference and analysis:-

“ITA No.6562/Mum/2009 & 219/Mum/2010 are cross appeals directed against order passed by Ld. CIT(A)-10, Mumbai dated 29/10/2009 for assessment year 2006-07. ITA No.6888/Mum/2011 is an appeal filed by the assessee against assessment order dated

11/8/2011 for assessment year 2006- 07 passed under section 144C(13) r.w.s. 143(3) r.w.s. 147 of the Income Tax act, 1961 (the Act). ITA No.8892/Mum/2010 and ITA No.6889/Mum/2011 are also appeals filed by the assessee against assessment orders dated 27/10/2010 and 10/8/2011 passed under section 144(C)(13) r.w.s. 143(3) of the Act for assessment years 2007-08 and 2008-09 respectively.

2. In ITA No.6888/Mum/2011 & 6889/Mum/2011 the assessee has also filed additional grounds. The grounds of appeal in all the appeals and additional grounds of raised in ITA No.6888 & 6889/Mum/2011 are reproduced below:

Grounds of Appeal in ITA No.No .6562 /MUM /2009(Assessee' s Appeal) :

On the facts and circumstances of the case and in law the learned Commissioner of Income-tax (Appeals)-10[CIT (A)] erred in confirming the following ground:

1.1 That on the facts and in circumstances of the case, the learned Commissioner of Income Tax (Appeals)-10, Mumbai (hereinafter referred to as 'CIT(A)') erred in confirming the decision of the Assessing Officer ('AC') that the amount of Rs.117,820,808 payable to Atos Origin Hongkong Private Limited ("ATOS") is taxable to tax in India as royalty income under Section 9(1)(vi) of the Income tax Act, 1961 ('the Act).

Grounds of Appeal in ITA No.No .219/M /2010(Revenue' s Appeal) :

1. On the facts and in the circumstances of the case and in law, the ld.CIT(A) erred in holding that the income from royalty in the case of the assessee is taxable @ 10% as the contract between the assessee and Standard Chartered Bank was entered into after 01/06/2005

2. On the facts and in the circumstances of the case and in law, the ld.CIT(A) erred holding that the contract between the assessee and Standard Chartered Bank has been entered after 01/06/2005 despite the fact that the services were provided by the assessee under the Cocteau Agreement dated 12/02/2004

Grounds of Appeal in ITA No.No .6888 /M/2010(Assessee' s Appeal)
:

1.1 On the facts and in the circumstances of the case and in law, the Deputy Director of Income- tax, (International Taxation) Range 1(1), Mumbai ('the Learned AO') erred in initiating reassessment proceedings under section 147 of the Incometax Act, 1961 ('the Act').

1.2 Without prejudice to above Ground No. 1.1, the Learned AO and the Dispute Resolution Panel ('the DRP') erred in holding the sum of Rs.11,78,20,808 as 'Royalty' under Section 9(1)(vi) of the Act. In doing so, the Learned AO and the DRP disregarded the Contract for Provision of Computing Services entered into between the assessee and SCB India for the services rendered by the assessee to Standard Chartered Bank India ('SCB India').

1.3 Without prejudice to above Ground No. 1.2, the Learned AO and the DRP erred in applying a higher rate of tax i.e. 20% (excluding surcharge and cess) as per section in 115A(1)(b)(A) of the Act to the

payments made by SCB India to the assessee, disregarding the revised rate of tax applicable for agreements entered into after June 1, 2005, i.e. 10% (excluding surcharge and cess). In doing so, the Learned AO failed to take cognizance of the fact that the assessee started rendering services to SCB India from Hongkong only from August 2005.

1.4 Without prejudice to above Ground No. 1.3, the Learned AO and the DRP erred in denying the benefit of the rate prescribed under section 11 5A of the Act. In doing so, the Learned AO and the DRP held that SCB India is a non resident company and does not fall within the ambit of the term 'Indian concern' as per the provisions of section 115A of the Act and accordingly, the provisions of section 115A of the Act do not apply to the payments made by SCB India.

2 On the facts and in the circumstances of the case and in law, the Learned AO erred in levying interest under section 234B of the Act without appreciating that the entire income of the assessee is subject to deduction of tax at source and hence, the question of advance tax, does not arise.

Additional Grounds of Appeal: The under mentioned grounds of appeal are without prejudice to other grounds –

1. Without prejudice to Ground Nos. 1.1 to 1.4, on the facts and in the circumstances of the case and in law, while calculating the tax liability of the Appellant, the learned AO has erred in adopting chargeable income as Gross receipts instead of net receipts received by the Appellant (i.e. After deducting the expenses attributable to Gross receipts). The Appellant humbly prays that the learned AO be

directed to compute the chargeable income of the Appellant by adopting net receipts instead of Gross receipts.

The Appellant humbly prays that the learned AO be directed to compute the chargeable income of the Appellant by adopting net receipts instead of Gross receipts.

Grounds of Appeal in ITA No.No.6889 /M/2011(Assessee' s Appeal)
:

1.1 On the facts and in the circumstances of the case and in law, the Learned AO and the Dispute Resolution Panel ('the DRP') erred in holding the sum of Rs.13,99,38,383 as 'Royalty' and 'Fees for Technical Services' under Section 9(1)(vi) and 9(1)(vii) of the Income tax Act, 1961 ('the Act'). In doing so, the Learned AO and the DRP disregarded the Contract for Provision of Computing Services entered into between the assessee and SCB India for the services rendered by the assessee to Standard Chartered Bank, India ('SCB India').

1.2 Without prejudice to above Ground No. 1.1, the Learned AO and the DRP erred in denying the benefit of the rate prescribed under section 115A of the Act. In doing so, the Learned AO and the DRP held that SCB India is a non resident company and does not fall within the ambit of the term 'Indian concern' as per the provisions of section 115A of the Act and accordingly, the provisions of section 115A of the Act do not apply to the payments made by SCB India.

2 On the facts and in the circumstances of the case and in law, the Learned AO erred in levying interest under section 234B of the Act

without appreciating that the entire income of the assessee is subject to deduction of tax at source and hence, the question of advance tax does not arise.

Additional Grounds of Appeal:

The under mentioned grounds of appeal are without prejudice to other grounds –

1.3 “Without prejudice to Ground Nos. 1.1 to 1.2, on the facts and in the circumstances of the case and in law, while calculating the tax liability of the Appellant, the learned AD has erred in adopting chargeable income as Gross receipts instead of net receipts received by the Appellant (i.e. After deducting the expenses attributable to Gross receipts).

The Appellant humbly prays that the learned AD be directed to compute the chargeable income of the Appellant by adopting net receipts instead of Gross receipts.

Grounds of Appeal in ITA No.No .8892 /M/2010(Assessee’ s Appeal)

:

1.1 On the facts and in the circumstances of the case and in law, the Additional Director of Income-tax, Range 1, Mumbai (‘the Learned AO’) and the Dispute Resolution Panel (‘the DRP’) erred in holding the sum of Rs.20,08,93,494 as Royalty’ and ‘Fees for Technical Services’ under Section 9(1)(vi) and 9(1)(vii) of the Income tax Act, 1961 (‘the Act”).

1.2 Without prejudice to above Ground No. 1.1, the Learned AO and the DRP erred in applying a higher rate of tax i.e. 20% (excluding surcharge and cess) as per section in 115A(1)(b)(A) of the Act to the payments made by SCB India to the assessee. In doing so, the AO and the DRP disregarded the Contract for Provision of Computing Services entered between the assessee and SCB India.

3. All these appeals were argued together by both the parties and for the sake of convenience all these appeals are being disposed of by this consolidated order.

4. It may be mentioned here that assessee in the present cases had filed application for extension of stay and vide order dated 4/10/2013 passed by the ITAT the applications filed by the assessee for extending the stay of demand in respect of assessment year 2006-07 and 2008-09 were dismissed. Against such order of ITAT the assessee had filed writ petitions before Hon'ble Bombay High Court which have been decided vide order dated 26/11/2013, copy of which was placed on our record. Their Lordships of Hon'ble Bombay High Court have granted the stay of outstanding demand in respect of assessment 2006-07 and 2008-09 and have also directed to dispose of the appeals relating to assessment year 2006-07 and 2008-09 expeditiously and in any case within a period of four months from the date of the order. Accordingly, these appeals of the assessee were fixed for hearing along with appeal of the assessee for 2007-08.

5. The assessee company is incorporated in Hongkong and providing services/facilities for the processing of data through computer software from Hongkong. The assessee is a non-resident in India. It

entered into a contact for provision of computing services, for the provision of data processing support to Standard Chartered Bank, India (SCB India) engaged in the business of banking in India. Under the said contract the assessee is processing data for SCB India in Hongkong and such services are being provided by the assessee to SCB India since 07/08/2005 from Hongkong. According to the assessee the same agreement prior to 7/8/2005 was prevailing and the services were provided by the assessee to SCB India from Singapore. So far as it relates to period prior to Aug.2005, it was submitted that the issues raised in the present appeals are covered in favour of the assessee by the order of the Tribunal dated 11/5/2011 in which it was held that the payments received by the assessee from SCB India for the provision of services of specialized data, processing of raw data, using mainframe computers cannot be characterized as a "royalty" u/s. 9(1)(vi) of the Act as well as under Article 12(3) of the DTAA prevailing between India and Singapore instead of in the nature of business profit. However, the receipts of the assessee in the years under consideration are from Hongkong and India does not have any DTAA with Hongkong, therefore, the taxability or otherwise of the receipts of the assessee in its hand in India is required to be examined under the domestic provisions which also have been amended by the Finance Act, 2012 by way of insertion of explanations 4, 5 & 5 to section 9(1)(vi) of the Act. Therefore, though the orders rendered by the Tribunal may be helpful to some extent but the issues raised in the present appeals are required has to be examined in the light of amended provisions of section 9(1)(vi) which have not been examined either by the AO, DRP or by the Tribunal. Thus the main issue which involved in all

these appeals is regarding the taxability or otherwise of the receipts of the assessee in the light of the aforementioned amended provisions. The aforementioned amendment is applicable from retrospective effect i.e. from 1/6/1976. Since the said retrospective amendment has been brought by the Finance Act, 2012 and the orders passed by the lower authorities and Tribunal were rendered before incorporation of the amended provisions, it is the case of Ld. AR that it will serve the interest of justice if the matter is restored back to the file of A.O. Ld. A.R has prepared a chart showing appeal wise grievances of the assessee as well department. The chart is as follows:

XXXXXXXXXXXXXX

5.1 Ld. AR has also specified various orders and their dates to show that the aforementioned retrospective amendment did not exist on the dates when these orders were passed. . The chart reads as under:

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5.2 On the above mentioned facts it was submitted by Ld. AR that as the matter has to be examined afresh in the light of aforementioned retrospective amendment, it would serve the interest of justice if the appeals except ITA No.6888/Mum/2011 are restored back to the file of AO. Ld. AR has also filed a letter and referring to the above facts it is pleaded in the letter that the matter should be restored back to the file of AO. The relevant portion of the said letter is reproduced below:

“4.1 The Ld. AO while passing the order for AY 2006-07 followed his predecessor’s order in the case of ATOS Singapore to hold that the payment made by SCB India to the Appellant is payment for Royalty. Further, the CIT(A) followed his predecessor’s order in the case of ATOS Singapore to confirm the action of the AO.

4.2 In AY 2007-08 & 2008-09, the AO in addition to holding the payment received is taxable as Royalty, also, alternatively, alleged it to be taxable as Fees for Technical Services (“FTS”) .The DRP confirmed the action of the AU in both the years.

4.3 At the outset, it may be stated that while passing the above orders (refer table given at point no. 3), none of the lower authorities considered the favourable order of the Hon’ble Tribunal passed in the case of ATOS Singapore and SCB India (ITA No.3824/M/o6 to 3828/M/o6, 1932/M/o8 to 1938/M/o8, 1457/M/o8) (order dated May ii, 2011) holding that the payment received from the SCB India for the provision of services of specialized data processing of raw data using mainframe computers cannot be characterized as a ‘royalty’ u/s 9(1)(vi) of the Income Tax Act, 1961 (“the Act”) as well as under Article 12(3) of the DTAA between India and Singapore but instead is in the nature of business profits.

4.4 Further, the Authorities also did not considered the retrospective insertion of Explanation 4, 5, & 6 to section 9(1)(vi) of the Act by the Finance Act 2012.

5) In view of the above, as unanimously considered during the hearing, that in the merit of justice the matter may be restored to the files of the Ld. AO to decide by allowing the Appellant reasonable

opportunity and the liberty to file any evidences! materials necessary to substantiate its contention.

5.3 On the aforementioned submissions of Ld. AR, Ld. DR did not have any objection. However, he submitted that if the issue raised in all the appeals except appeal No.6888/Mum/2011 are being restored to the file of AO then the appeal of the assessee in ITA No.6888/Mum/2011 will become infructuous as the only issue on merits raised by the assessee is regarding tax liability of the assessee and the rate of tax applicable thereon. It was submitted that the same issue is involved in the appeal of the Department for the same year i.e. ITA No.219/Mum/2010. It was submitted that as the issue regarding rate of tax has to be re-examined and re-adjudicated by the AO as per law then the appeal filed by the assessee with regard to rate of tax applicable will become infructuous. Ld. DR further submitted that the other issue raised by the assessee in ITA No.6888/Mum/2011 is regarding interest levied under section 234B of the Act. According to Ld. DR the said issue is consequential to the assessed income which has also to be considered by the AO while examining the liability of the assessee and assessee will be having right to file objections against such levy which will be decided by the AO as per law. To such submission of Ld. DR, Ld. AR submitted that the issue regarding levy of interest under section 234B though is consequential but its levy can be challenged by the assessee as per law if the matter is restored back to the file of AO.

6. We have heard both the parties and their contentions have carefully been considered. From the above discussion is clear that the liability or otherwise of the assessee regarding its receipts has to

be re-adjudicated in the light of aforementioned retrospective amendment. The orders passed in the assessee's case by the AO, DRP and ITAT are prior to the aforementioned amendment in the Statute. Therefore, we are of the opinion that it would serve the interest of justice if all these appeals except ITA No.6888/mum/2011 are restored back to the file of AO with a direction to re-adjudicate the issues in accordance with law after giving further opportunity to the assessee and placing all the material required for adjudication of the issues raised in the present appeals. After giving such opportunity the AO will re-adjudicate all the issues raised in the present appeals as per provisions of law.

7. So far as it relates to grievances of the assessee in ITA No.6888/Mum/2011, the main grievance of the assessee is regarding initiation of re-assessment proceedings in respect of tax liability of the assessee regarding its receipts from SCB India and for the same assessment year in original proceedings, the same is restored back to the file of AO for re-adjudication.

7.1 Similar is the position in respect of Ground No.1.3 & 1.4 and additional ground No.1.5 in which the assessee has raised grievances regarding rates of tax to be applied on the above receipts. All these issues on merits are to be readjudicated as per law in ITA No.6562/Mum/2009 & 219/Mum/2010 being cross appeals in respect of assessment year 2006-07 against original assessment.

7.2 The other issues raised in ITA No.6888/Mum/2011 regarding leviability of interest under section 234B which was admitted to be consequential and with a rider that assessee has liberty to show

before AO why it is not liable for levy of interest under section 234B, the matter would be re-adjudicated in original assessment proceedings as discussed in para 5.3 of this order.

7.3 In view of above discussion since all the issues raised on merits in ITA No.6888/Mum/2011 are restored back to the file of A.O in ITA No.6562/Mum/2009 & ITA No.219/Mum/2010 (being cross appeals in respect of assessment year 2006-07, i.e. original assessment proceedings) and are directed to be re-adjudicated as per law, then the validity of reassessment proceedings cannot be upheld. Upholding the validity of reassessment in the present case will tantamount to upholding the validity of the two assessments at a time of the same assessee in respect of same assessment year, which is not permissible in the eyes of law. Therefore, Ground No.1 of ITA No.6888/Mum/2011 is allowed and other grounds of the said appeal are dismissed having become infructuous in the light of our decision in ITA No.6562/Mum/2009 & ITA No.219/Mum/2010

7.4. In the result, ITA No 6888/Mum/2011 is partly allowed.

8. To sum up ITA No.6888/Mum/2011 is partly allowed and all other appeals are allowed for statistical purposes.

Order pronounced in the open court on 07/03/2014”

If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, conclusion drawn in the order of the Tribunal on quantum addition, assertions made by the ld. respective counsel, if

kept in juxtaposition and analyzed, we find that the Tribunal has sent the quantum addition back to the file of the Assessing Officer, therefore, we are not in agreement with the submission of the ld. counsel for the assessee that penalty may be deleted because quantum has not been deleted rather it has been sent back to the Assessing Officer, therefore, in all fairness and to safeguard the interest of both sides and keeping in view the principle of natural justice, we remand both these files of penalty also to the file of the ld. Assessing Officer for adjudication and to decide in accordance with law after taking a decision in the quantum appeals. Both the appeals of the assessee are allowed for statistical purposes only.

Finally, both the appeals of the assessee are allowed for statistical purposes only.

This order was pronounced in the open in the presence of ld. representatives from both sides at the conclusion of the hearing on 07/04/2016.

Sd/-

(Rajendra)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 07/04/2016

Shekhar, P.S. नि.स.

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

1. अपीलार्थी / The Appellant (Respective assessee)
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai,
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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