

IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND SHRI LALIET KUMAR, JUDICIAL MEMBER

IT(TP)A No. 584/Bang/2015
Assessment year : 2010-11

M/s. Conergy Energy Systems Private Limited, (formerly known as Sun Technics Energy Systems Pvt Ltd) No. 660/1, 100 Feet Road, Indiranagar, Bangalore – 560 038. PAN: AAJCS 2898A	Vs.	The Assistant Commissioner of Income Tax, Circle-2(1)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri H.C. Khincha, CA
Respondent by	:	Shri G. Kamaladar, Standing Counsel

Date of hearing	:	14.03.2017
Date of Pronouncement	:	22.03.2017

ORDER

Per Laliet Kumar, Judicial Member

The present appeal is arising out of the assessment order dated 29.01.2015 passed by the AO pursuant to the order passed by the DRP on 26.12.2014 on the following grounds.

General Ground

The learned Assistant Commissioner of Income Tax, Circle-2(1)(1), Bengaluru (hereinafter referred as “AO” for brevity), learned Deputy Commissioner of Income Tax (Transfer Pricing) - IV, Bengaluru (hereinafter referred as “TPO” for brevity) and the honourable DRP – I (“AO”, “TPO” and DRP collectively referred as “lower authorities” for brevity) have erred in passing the orders in the manner passed by them.

The orders being bad in law are liable to be quashed.

Grounds relating to Transfer Pricing :-

I The lower authorities have erred in:

1. making transfer pricing adjustment of Rs. 1,67,21,334/-
2. making a reference to Transfer Pricing Officer for determining arm's length price.
3. not appreciating that there is no amendment to the definition of “income” and charging or computation provision relating to income under the head “Profits & Gains of Business or Profession” do not refer to or include the amounts computed under Chapter X’ and therefore addition under Chapter X is bad in law.
4. passing the order without demonstrating that the Appellant had motive of tax evasion.
5. treating arms length price of payment of central shared service fees and technical services fees totally amounting to Rs. 1,67,21,334/- as NIL.

II On the facts and circumstances of circumstances of the case and law applicable, no TP adjustment should be made and the entire TP adjustment of Rs. 1,67,21,334/- is to be deleted in entirety.

III Levy of interest under section 234B

The learned assessing officer has erred in levying a sum of Rs 25,75,946/- as interest under section 234B. On the facts and circumstances of the case, interest under section 234B is not leviable. The Appellant denies its liability to pay interest under section 234B.

The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays accordingly.

2. The Id. AR has drawn our attention to the application filed by the assessee for taking the additional evidence on record. It was contented by the Id. AR that before the TPO Shri Seshadri Nimmala, Company Secretary was appealing on behalf of the company and the said company secretary has resigned on 30.08.2013, therefore the company was not in a position to file the TP study in terms of the mandatory provision of law. For that purposes the Id. AR has drawn our attention to para 5.4 of the TPO at page 3 to the following effect.

5.4 On the following day i.e. on 16.9.2013 the taxpayer filed before the TPO the same set of documents filed earlier as mentioned in **Para 5.1** above, without the Prescribed TP document. Subsequently, another letter was issued to the taxpayer on 10.9.2013 again informing the taxpayer about the penal provisions that are attracted due to non-maintenance and non filing of TP Study. It was also proposed in the letter that the TPO would proceed to determine the ALP of the international transactions on the basis of material available on record as the taxpayer has not been able to discharge its onus of substantiating on the basis of material available with him that the international transactions entered into by it are in accordance with section 92 of the Income-tax Act. The relevant portion of the notice dated: 10.9.2013 is reproduced below:

2. I find from your letter under No. CGY/FINANCE/IT/2013-14/103 received by this office on 16.7.2013 that you have enclosed Form 3CEB as the 'Transfer Pricing Report'. Requisitions for furnishing the prescribed TP Documentation same was sent to you by this office vide notice dated: 29.4.2013.

3. Section 92D of the Income-tax Act, 1961, read with Rule 10D of the Income-tax Rules prescribes certain information and documents as under which are to be kept and maintained under section 92D. Rule 10D of the Income-tax Rules reads as under:

Information and documents to be kept and maintained under section 92D:

".....10D (1) Every person who has entered into an international transaction shall keep and maintain the following information and documents, namely:-

- (a) a description of the ownership structure of the assessee enterprise with details of shares or other ownership interest held therein by other enterprises;
- (b) a profile of the multinational group of which the assessee enterprise is a part along with the name, address, legal status and country of tax residence of each of the enterprises comprised in the group with whom international transactions have been entered into by the assessee, and ownership linkages among them;
- (c) a broad description of the business of the assessee and the industry in which the assessee operates, and of the business of the associated enterprises with whom the assessee has transacted;
- (d) the nature and items (including prices) of international transactions entered into with each associated enterprise, details of property transferred or services provided and the quantum and the value of each such transaction or class of such transaction;
- (e) a description of the functions performed, risks assumed and assets employed or to be employed by the assessee and by the associated enterprises involved in the international transaction;
- (f) a record of the economic and market analyses, forecasts, budgets or any other financial estimates prepared by the assessee for the business as a whole and for each division or product separately, which may have a bearing on the international transactions entered into by the assessee;

- (g) a record of uncontrolled transactions taken into account for analyzing their comparability with the international transactions entered into, including a record of the nature, terms and conditions relating to any uncontrolled transaction with third parties which may be of relevance to the pricing of the international transactions;
- (h) a record of the analysis performed to evaluate comparability of uncontrolled transactions with the relevant international transaction;
- (i) a description of the methods considering for determining the arm's length price in relation to each international transaction or class of transaction, the method selected as the most appropriate method along with the explanations as to why such method was so selected, and how such method was applied in each case;
- (j) a record of the actual working carried out for determining the arm's length price, including details of the comparable data and financial information used in applying the most appropriate method, and adjustments, if any, which were made to account for differences between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions;
- (k) the assumptions, policies and price negotiations, if any, which have critically affected the determination of the arm's length price;
- (l) details of the adjustments, if any, made to transfer prices to align them with arm's length prices determined under these rules and consequent adjustment made to the total income for tax purposes;
- (m) any other information, data or document, including information or data relating to the associated enterprise, which may be relevant for determination of the arm's length price.

(2) Nothing contained in sub-rule (1) shall apply in a case where the aggregate value, as recorded in the books of account, of international transactions entered into by the assessee does not exceed one crore rupees:

Provided that the assessee shall be required to substantiate, on the basis of material available with him, that income arising from international transactions entered into by him has been computed in accordance with section 92."

(Italics added)

4. It is therefore seen that, none of the prescribed documents, as above, required to be maintained by the taxpayer, as per the requirement of section 92D of the Income-tax Act, 1961 read with Rule 10D of the Income-tax Rules, 1962, have been furnished by the taxpayer, before the TPO. Failure to keep and maintain information and document, etc. required by sub-section (1) or sub-section (2) of section 92D attracts penalty under section 271AA of the Income-tax Act, 1961 and failure to furnish information or document under section 92D attracts penalty under section 271G of the Income-tax Act, 1961. The TPO is further of the view that the taxpayer has not been able to discharge its onus of substantiating, on the basis of the material available with him, that the international transactions entered into by it, are in accordance with section 92 of the Income-tax Act, 1961 and therefore are at arm's length which it is required to discharge. The TPO therefore proposes to determine the ALP of the international transactions entered into by the taxpayer with its AEs on the basis of material available on record.

No response was received from the taxpayer even on this letter.

3. It was pointed out by the Id. AR that the assessee company was taken over by another group called Canara Power Projects Promoters In., and a share transfer agreement was also executed on 17.01.2014 and as a result thereof the entire managing team has quit the office, the new management team are to be in place, therefore also the document which are required to be filed were neither filed before the AO nor the TPO nor before the DRP. It was submitted that the assessee has disclosed the just and reasonable cause which prevented the assessee from not complying the provisions of the Act by not filing the TP study even after the notice was received by the office of the assessee on 15.07.2013. Since the assessee management of the assessee is now being taken by the new management and is keeping the entire record, therefore it was submitted that the additional evidence be permitted to be placed on record and accordingly the matter be remanded back to the file of TPO for adjudication.
4. On the other hand, the Id. DR, has drawn our attention to paragraph 3.2 of the DRP proceedings wherein it is elaborately mentioned that despite the obligation and mandatory requirement

to maintain the record u/s. 92D of the IT Act read with rule 10D, the assessee has failed to discharge its onus to prove that the international transaction were on its arm length . It was submitted that no reasons have been filed for not submitting the document before the DRP.

5. We have heard the rival parties and gone through the records. The application for submissions of additional documents was filed under rule 29 of the ITAT Rules, 1963. Along with the application the assessee has filed the letter resignation of company secretary and documents evidencing. On the basis of which it is submitted that these documents, if examined by the TPO, then no TP adjustment is called for. In our view it is the statutory and legal duty of the assessee to maintain the record as per the Rule 10D r.w.s. 92D of the IT Act and on receipt of the notice from the TPO, the assessee should have filed a TP study with the TPO to justify that the international transaction were at arm length price. In the present case neither the records were maintained by the assessee nor it was file before the TPO or before the DRP. Even no application for additional evidence was filed before the DRP by the assessee. For the first time, the application was made before the

Tribunal for admitting the additional evidence, mentioned hereinabove.

6. In our view, the entire purpose of exercising the TP study is to tax the taxable income and for that purposes the exercising is being undertaken by the TPO to find out whether the international transaction transacted by the assessee with its AE was at arm length price or not. In our view, even if the assessee has not filed the TP study, or the TP study filed by the assessee is being rejected by the TPO, the TPO selects its own comparable and thereafter apply the most appropriate method for determining the ALP. For that purposes, the show cause notice, after rejecting the TP study is contemplated. In the present case, the TPO has not issued any show cause notice after giving the list of comparable, rather TPO has resorted to the application of CUP method for determining the ALP of international transaction. In our view, the action of the TPO to apply the CUP method however was not warranted in given set of facts. In our view, the show cause notice was given by the TPO on 15.07.2013 and however the entire management team along with the Company Secretary have left the office and new management had taken over the assessee and in view of that the necessary documents / sources were

not furnished before the TPO. Therefore there was no occasion for the assessee to file reply to the show cause and submit documents. This is clear from the letter dated 20.11.2013 where it was explained before us, that the entire management team along with the Company Secretary have left the office and new management had taken over the assessee and in view of that the necessary documents / sources were not furnished before the TPO. In our view, the assessee was able to make out the case for accepting the additional evidence filed before us and accordingly we allow the same.

7. Since we have allowed the additional evidence, therefore in the light of that it become necessary to remand back the matter to the file of the TPO for examining the additional evidence filed before us and decide the matter in accordance with law. Further the TPO is directed to consider the evidence filed before us only for the purposes of arriving at the ALP and the international transactions entered between the assessee as well as its aid. Needless to say the TPO shall issue the appropriate notice and shall grant personal hearing in the matter before taking any final decision.

8. In the result, the appeal of the assessee is allowed for statistical purposes.

Pronounced in the open court on this 22nd day of March, 2017.

Sd/-
(INTURI RAMA RAO)
Accountant Member

Sd/-
(LALIET KUMAR)
Judicial Member

Bangalore,
Dated, the 22nd March, 2017.

/ MS/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.