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

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND SHRI AMARJIT SINGH, JUDICIAL MEMBER

ITA No. 1122/MUM/2006
(Assessment Year : 2002-03)

M/s. i 2 Technologies India Pvt. Ltd.
143-C, S.D.F-V, Seepz,
Andheri East,
Mumbai 400096
PAN:AABCC 5420G ... Appellant

Vs.

The ACIT, Cir. 8(2),
Mumbai. .... Respondent

ITA No. 1197/MUM/2006
(Assessment Year : 2002-03)

The ACIT, Cir. 8(2),
Mumbai. ..... Appellant

Vs.

M/s. i 2 Technologies India Pvt. Ltd.
143-C, S.D.F-V, Seepz,
Andheri East,
Mumbai 400096 ..... Respondent

Assessee by : Shri Arvind Sonde
Respondent by : Shri Sambit Mishra

Date of hearing : 10/03/2016
Date of pronouncement : 10/03/2016

ORDER

PER G.S. PANNU,AM:

The captioned cross-appeals filed by the assessee and Revenue pertaining to A.Y. 2002-03 are directed against an order passed by Ld. CIT(A)-VIII, Mumbai dated 12/12/2005, which in turn arises out of an order passed by AO under section 143(3) of the Income Tax Act, 1961 (the Act) dated 29/03/2005.

2. The Grounds of appeal raised by the assessee as well as Revenue read as under:-

Grounds of Assessee's Appeal:-

"A] The order of the CIT (Appeals) is bad in law and on facts as he has failed to interfere with a patently illegal order passed by the TPO and incorporated by the AO in the assessment order. The learned CIT (Appeals) ought to have realized that the interest cost included by the TPO is only a notional expense and not a real one. The learned CIT (Appeals) erred in ignoring the fact that the adjustment made with regard to travel expenses had to be ignored. The learned CIT (Appeals) further erred in not adopting the CUP method and applying the available data with respect to the financial year 2001-02. The CIT (Appeals) also erred in accepting the action taken by the TPO in eliminating the data pertaining to companies having turnover less than Rs.5 crores. In general, the CIT (Appeals) erred in upholding the order of the TPO as incorporated in the AO.

B] The Appellant submits that the provisions of Section 92C(4) would apply only when the AO independently makes an assessment and not when the TPO passes an order which according to the AO is binding on him. Hence, the denial of exemption under Section 1OA with respect to the adjustment made by the TPO is opposed to law and to facts.

C] The CIT (Appeals) failed to realize that software expenses are revenue in nature and fully allowable.

D] The CIT (Appeals) erred in upholding the denial of relief under Section 1OA with respect to interest received on temporary investment of surplus funds.

E] For these and other grounds that may be adduced at the time of hearing may be allowed."

Ground of Revenue's Appeal:-

"On the facts and in the circumstances of the case and in law, the Commissioner of Income Tax (Appeals) erred in directing the Assessing Officer to allow depreciation @ 60% as against 25% allowed by him, considering that the amendment was effective from A.Y.2003-04, without appreciating the facts of the case."

2. The substantive dispute in the appeal of the assessee relates to the addition on account of transfer pricing adjustment with respect to the international transaction undertaken by the assessee with its associated enterprise. At the time of hearing, it was a common point between the parties that the issue may be set-aside to the file of the Assessing Officer /Transfer Pricing Officer to carry out the proceedings afresh on account of a fundamental error that has crept in. Elaborating the issue, the Ld. Representative for the assessee pointed out that the assessee is a wholly owned subsidiary of M/s. i2 Technologies Inc., Netherlands and it is providing software development and consultancy services to its associated enterprise. It is being remunerated at cost plus 10% mark-up for rendering such services. It was pointed out that the Transfer Pricing Officer has used the TNM method for the purposes of determining the arm's length price of software development services rendered by the assessee to its associated enterprise. In carrying out such comparability analysis, data of the comparables which has been used is corresponding to financial year 2000-01, whereas the financial

year relevant for the assessment year under consideration is 2001-02. Another area of dispute pointed out by the Ld. Representative for the assessee is that the action of the Transfer Pricing Officer in imputing a mark-up on account of interest payable on the interest free loans taken by the assessee from the associated enterprise. Thirdly, it was pointed out that the lower authorities have further erred in including travel expenses reimbursed to the assessee by its associated enterprise and in imputing the mark-up on the same without appreciating that in the case of reimbursement of expenditure, no mark-up is chargeable.

3. On the aspect of use of the data relating to the relevant financial year, the provisions of Rule 10B(4) of the Income Tax Rules, 1962 are quite pertinent. In terms of sub-rule(4) of Rule 10B it is prescribed that the data to be used in analysing the comparability of an uncontrolled transaction with an international transaction shall be the data relating to the financial year in which international transaction has been entered into. In the present case, the international transaction which has been subject to the comparability analysis has been entered into by the assessee in financial year 01/04/2001 to 31/03/2002 and, therefore, the data to be used of the comparable concerns must correspond to such financial year as prescribed by Rule 10B(4) of the Rules. It was a common point between the parties before us that the impugned transfer pricing/assessment proceedings suffer from the infirmity of non-compliance with the above requirement of Rule 10B(4) of the Rules. Accordingly, without going further into any other

disputes between assessee and the Revenue with regard to the transfer pricing adjustment, it is deemed proper to set-aside the order of the CIT(Appeals) and restore the matter back to the file of the Assessing Officer / Transfer Pricing Officer to revisit the process of determination of arm's length price of the international transaction in accordance with law. Needless to mention, the Assessing Officer / Transfer Pricing Officer shall allow the assessee an appropriate opportunity of being heard before passing an order afresh as per law.

4. With regard to the other aspects of the transfer pricing relating to mark-up on interest on loans raised from associated enterprise and the reimbursement of travel expenses, etc., the same are also restored back to the file of Assessing Officer / Transfer Pricing Officer for proceeding afresh in line with our aforesaid direction. In this manner Grounds A& B of the assessee's appeal are disposed off.

5. In so far as Grounds of Appeal No. "C" is concerned, the same has not been pressed and accordingly the same is dismissed.

6. In so far as Ground No. "D" of assessee's appeal is concerned, the same relates the allowability of relief under section 10A of the Act with respect to interest income, which issue was also agreed by the parties to be restored back to the file of Assessing Officer / Transfer

Pricing Officer to be adjudicated afresh in accordance with law. We direct accordingly.

7. Accordingly, in so far as appeal of the assessee is concerned, the same is treated as partly allowed, as above.

8. In the appeal of the Revenue, the solitary issue relates to the action of the CIT(Appeals) in directing the Assessing Officer to allow a depreciation @60% on the cost of software acquired. The background of the dispute is that in the return of income assessee claimed an expenditure of Rs.37,70,869/- incurred towards acquisition of software as revenue expenditure. The Assessing Officer treated the same as capital nature and allowed depreciation on the same @25% treating it to an intangible asset. The CIT(Appeals) affirmed the stand of the Assessing Officer that such an expenditure was capital in nature but allowed depreciation on it at higher rate of 60% as against 25% allowed by the Assessing Officer. The assessee's grievance against the decision of the CIT(Appeals), manifested by Ground of appeal No. C in the cross-appeal has not been pressed before us. The Revenue in its appeal is contesting the action of the CIT(Appeals) in allowing depreciation @60% as against 25% allowed by the Assessing Officer.

9. On this aspect, it was a common point between the parties that the order of the CIT(Appeals) deserves to be reversed in as much as 60% depreciation rate on 'computer software' has been inserted in

Appendix-1 to the Income Tax Rules, 1962 classifying the 'computer software' as a tangible asset under the head "Plant" is w.e.f. 01/04/2003. As a consequence, so far as the instant assessment year is concerned, the allowance of deprecation on 'computer software' shall be governed by the decision of the Tribunal in the case of Amway India Enterprises vs. DCIT, 111 ITD 112 (Delhi)(SB), whereby the depreciation under section 32(1)(i) of the Act on 'computer software' has been held to be allowable @ 25%. Thus, we set-aside the order of the CIT(Appeals) on this aspect and allow the plea of the Revenue.

10. Resultantly, whereas the appeal of the assessee is partly allowed, that of the Revenue is allowed.

11. The above decision was pronounced in the open court in the presence of both the parties at the conclusion of the hearing on 10/03/2016.

Sd/	Sd/-
(AMARJIT SINGH)	(G.S. PANNU)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dated 10/03/2016

Vm, Sr. PS

Copy of the Order forwarded to :

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

BY ORDER,

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