

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B", BANGALORE**

Before Shri George George K, JM & Shri Jason P.Boaz, AM

ITA No.1396/Bang/2015 : Asst.Year 2009-2010

M/s.Ascendas Services India Private Limited 1 st Floor, Inovator Building Whitefield Road, International Tech Park Bangalore – 560 066. PAN : AA ACT7290C.	Vs.	Dy.Commissioner of Income-tax, Circle 1(1)(1) Bangalore.
(Appellant)		(Respondent)

Appellant by : Shri Sampathi Raghunathan, Advocate

Respondent by : Shri Padmameenakshi, JCIT

Date of Hearing : 24.10.2017	Date of Pronouncement : 27.10.2017
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ORDER

Per George George K, JM

This appeal at the instance of the assessee is directed against CIT(A)'s order dated 28.09.2015. The relevant assessment year is 2009-2010.

2. The grounds argued by the learned AR read as follows:-

“3. *Shifting of profits of other group entities.*

On the facts and in the circumstances of the case and without taking cognizance of the submissions filed by the Appellant, the Ld.CIT(A) erred in law and in facts by upholding the re-assessment proceedings as valid and proper.

a) *there has been shifting of profits by the Appellant to other group companies and that there is an arrangement*

of shifting profits from non-tax exempt units to the units enjoying tax benefits;

b) the services provided by the Appellant to its clients are below the market rates and hence the Appellant has incurred losses; and

c) the Property Management Agreement is not based on any business objectives but based on other extraneous factors.

4. Rejection of books of accounts and Best judgment assessment.

4.1 On the facts and in the circumstances of the case and without taking cognizance of the submissions filed by the Appellant, the Ld.CIT(A) erred in law and in facts in holding that the DCIT was justified in proceeding with the best judgment assessment.

4.2 On the facts and in the circumstances of the case, the Ld.CIT(A) erred in law and in facts in not appreciating the fact that a detailed verification of the books of accounts and other details has been made during the assessment proceedings under section 143(3) of the Act and the same have been accepted by the DCIT in the assessment order.”

3. Brief facts of the case are as follows :

3.1 The assessee is a company engaged in the business of rendering technical and management consultancy services to primarily to companies operating industrial park / SEZ. For assessment year 2009-2010, the return of income was filed on 30.09.2009 declaring a loss of Rs.8,44,00,514. The assessment u/s 143(3) was completed vide order dated 12.09.2011 accepting the loss returned. Thereafter notice u/s 148 was issued on 13.03.2013. The reasons stated for

reopening the assessment was that in the assessment completed for assessment year 2010-2011, the A.O. had concluded that the assessee was shifting profits to other group entities, which were entitled to the benefit of deduction under Chapter VI-A of the Income-tax Act, 1961 and the same situation was prevailing in the current assessment year, namely assessment year 2009-2010. The reassessment was completed u/s 143 read with section 147 of the Act vide order dated 31.01.2014 determining the taxable income at Rs.5,11,54,010. While completing the re-assessment, the following additions were made:-

(i)	Business Income	Rs.3,01,30,178
(ii)	Profit from bus facility	Rs.1,76,74,067
(iii)	Interest and miscellaneous Income	Rs.33,49,765

3.2 The Assessing Officer had rejected the books of account and made a best judgment assessment by estimating the profits of the business at the rate of 8% of the turnover, which works out to Rs.3,01,30,178. The reasoning of the A.O. for rejecting the books of account was that like in the assessment year 2010-2011, the assessee for the current assessment year was shifting the profits to other group entities which was enjoying the benefit of deduction under Chapter VI-A of the Act.

3.3 Aggrieved by the order of reassessment, the assessee preferred an appeal to the first appellate authority.

3.4 The CIT(A) confirmed the action of A.O., in rejecting the books of account of assessee and estimation of business profits at 8% of turnover. The relevant finding of the CIT(A) in affirming the assessment order for rejecting the books of account and estimating average profit at the rate of 8% for service business reads as follow:-

“8. The AO has relied on the Hon’ble Supreme Court judgment of McDowell and Co. Ltd. to state that it is a fit case where the corporate veil has to be pierced and almost all the core functions of the clients are performed by the assessee. The assessee is in charge of almost everything connected to the business of the finance, under valued price. The actual control of the assessee as well as its clients rests with the ultimate holding company. The functions of the assessee form the bedrock of the whole structure that manages the business of Infotech parks in India, but the income generated does not leave anything much for the assessee, every Rs.100 earned bring loss of Rs.38. In these circumstances, the AO was fully justified in proceed with the best judged assessment as per section 144 r.w.s. 145(3) of the Income-tax Act.

8.1 Going by all the above, this is a clear case of a megalith trying to shift profits among its crossly-held smaller entities with a purpose of avoiding higher tax outflow and claiming undue tax benefits. This was a fit case to reject the profit computations made by the assessee and estimate the business profits afresh. The AO has adopted the correct approach.

9. *Basis for considering an average profit rate of 8% for service business:*

The AO has analysed certain industry comparables like Elnet Technologies Ltd. and L&T Infocity Ltd and has come to the conclusion that the base level profits of the company should be 15% of sales, keeping in view that there can be individual differences in various cases. He

has calculated margins at 35%, reduced to 15% and in turn estimated only at 8%. Considering the circumstances and facts of the case and the nature of the business structure of the assessee, the AO is fully justified in estimating the profit at Rs.3,01,30,178/- at 8% of the services.”

3.5 Aggrieved by the order of the CIT(A), assessee has filed the present appeal before the Tribunal.

3.6 The learned Counsel for the assessee submitted that the assessment was reopened for the current assessment year, namely assessment year 2009-2010, on the basis of the assessment concluded for assessment year 2010-2011. It was submitted by the learned AR that the assessment for assessment year 2010-2011 was taken in appeal by the assessee and the Hon'ble Tribunal had decided the issue in favour of the assessee. Accordingly, it was submitted that the matter is squarely covered in favour of the assessee by the order of the Tribunal in ITA No.3/Bang/2014 dated 04.12.2015 (copy of the order of Tribunal is produced at page 345 to of the paper book filed by the assessee).

3.7 The learned Departmental Representative supported the orders of the Income-tax authorities.

4. We have heard the rival submissions and perused the material on record. The assessment for the current assessment year, viz., the assessment year 2009-2010 was reopened based on the assessment order for assessment year

2010-2011. The reasons stated for reopening the assessment for the relevant assessment year is reproduced below:-

“During the assessment proceedings for the AY 2010-11 it was established in the 29-page order, based on strong facts and detailed reasoning, that the assessee is undervaluing its earnings. This was done by a complex group structure wherein the profits of the assessee company are shifted to other group companies that claim various tax exemptions. Due to this, the conglomerate as a whole was able to save on its tax outflow. Broadly the same facts are applicable for the AY 2009-10 and I have a reason to believe that there is an escapement of income chargeable to tax.”

4.1 The Tribunal in assessee’s own case for assessment year 2010-2011 in ITA No.3/Bang/2014 had decided the issue in favour of the assessee. The Tribunal held that the Assessing Officer is not justified in rejecting the books of account of the assessee merely on the ground that assessee had incurred loss for the assessment year 2010-2011. The Tribunal further observed that when receipts are under-invoiced for the services rendered by the assessee to its group concerns, the Assessing Officer ought to have determined the arm’s length price. The Tribunal was of the view having not determined the arm’s length price of the services to the related parties, rejection of the books of account without finding any defect in the same is uncalled for, and therefore, the estimation of business profit at 8% was unjustified. The relevant finding of the Tribunal reads as follow:-

“5. We have considered the rival submissions as well as the relevant material on record. We have given our deep

thought to the facts and circumstances of the case as well as the findings of the Assessing Officer and the CIT (Appeals). The Assessing Officer proceeded to reject the books of accounts of the assessee on the reason that the assessee has reported a huge loss of Rs.10,37.79,254 from the activity of providing services to the related parties. It is pertinent to note that the service charges by the assessee are agreed between the parties as per the Master Agreement apart from the respective agreement between the parties. There is no doubt that reporting an abnormal loss can trigger an enquiry and investigation on the part of the Assessing Officer to find out the proper and actual reason for such loss. However, the loss itself does not be a reason or ground for rejecting the books of accounts or making any addition on estimation of income. The Assessing Officer has doubted the price charged by the assessee to the related parties and concluded that the assessee has undervalued the charge from the related parties in respect of various technical and managerial services like property management, project management rendered to the related parties. Thus, what was doubted by the Assessing Officer and subject matter of investigation and enquiry was the price charged by the assessee in respect of the service rendered and not any incorrect information or data recorded in the books of accounts. In a case the Assessing Officer has the reason to believe that the assessee has undervalued the price charged to the related parties, then the proper course of action as per the provisions of the Act should have been to determine the Arm's Length Price. In respect of the services rendered by the assessee to its related parties. There is no dispute that the assessee received the services charges from the related parties as per the price agreed between the parties under respective agreements as well as Master's Agreement. It is also not in dispute that whatever recorded in the books of accounts is the actual price received by the assessee from its related parties to whom the services were rendered. Therefore it is not the case of the Assessing Officer that the assessee has recorded incorrect price in the books of accounts and received something else from the related parties. Once the amount reduced by the assessee towards services

charges from the related parties is correctly recorded in the books of accounts, then whatever was doubted by the Assessing Officer is not found any defect in the books of accounts but it may be a case of undervaluation of the service charges agreed between the parties as per the agreements. Therefore, the difference if any, could have been only in the services charges agreed between the parties and not in the books of accounts. The Assessing Officer has cited the reasons for invoking the provisions of section 145(3) as under valuing the service charges as per the agreement and thereby shifting the profit to the related parties some of whom are eligible deduction under Chapter VIA of the Act. In order to invoke the provisions of section 145(2), the Assessing Officer has to point out discrepancies and defects in the books of accounts. In the case on hand, the Assessing Officer has not pointed out any defect or deficiency in the books of accounts but it proceeded only on the ground that the assessee has charged the price which is undervalued from its related parties. Therefore, instead of proceeding to determine the ALP in respect of the services render by the assessee to its related parties, the Assessing Officer chose to proceed under Section 145(3) which is not permissible in the facts of the present case when the Assessing Officer was not able to find out any defect or deficiency in the books of accounts. Thus we do not find any reason to interfere with the order of the CIT (Appeals) so far as it relates to the finding that the books of accounts rejected by the Assessing Officer under Section 145(3) are not proper and justified.

6. *The next question arises regarding the estimation of the income of the assessee. The Assessing Officer proceeded to estimate the income of the assessee by taking into consideration the profit of the entities chosen by the Assessing Officer. Therefore instead of determining the ALP of the services rendered by the assessee to its AE, the Assessing Officer proceeded to estimate the income of the assessee on the basis of profits of some selected parties. In the case when the Assessing Officer has a reason to believe that the assessee has not charged the price from the related parties at Arms Length, then*

the Assessing Officer could have proceed to determine the ALP by selecting the independent transactions between the unrejected parties. But instead of determining ALP the Assessing Officer has estimated the income which is not permissible when the accounts of the assessee were not found in any deficiency or suffering from any defect. It is pertinent to note that the profit of an entity is effected by various factors including the fixed cost, the capacity at which the particular entity functions in comparison to its total capacity and further the stage of the business of a particular entity whether it is the initial stage or after stabilization of the business activity. In the case on hand, the Assessing Officer has accepted the service charges charged by the assessee to its AEs, in the subsequent assessment years. It is reproduced by the Assessing Officer in the impugned assessment order that the assessee has earned the profits in the subsequent assessment years. The revenue has not disputed the fact that the earlier assessment year as well as subsequent assessment year, the price charged by the assessee to its parties the services rendered by the assessee are accepted by the Assessing Officer. It is also not in dispute that the price charged by the assessee to its related parties are under the same service agreement in the earlier Assessment Year, the assessment year under consideration and subsequent assessment year. Further, except the assessment year under consideration the Assessing Officer has not doubted the service charges received by the assessee under the same agreement and only in the assessment year under consideration, the Assessing Officer concluded that the price charged by the assessee is undervalued. Though the doctrine of res judicate is not applicable in the matter of taxation however, when the facts and circumstances are identical and there is no change even in the price charged during the year under consideration in comparison to the earlier assessment year as well as subsequent assessment year the Assessing Officer is not permissible to take a different a view by picking and choosing a particular assessment year. Therefore, the rule of consistency demand, that the Assessing Officer cannot take a different view in a particular assessment year without

pointing out any change in the facts and circumstances for that particular assessment year. Thus when the Assessing Officer has already accepted that this price charged by the assessee to the related parties under the same agreement in the earlier assessment years as well as in the subsequent years then picking up only one assessment year on the ground that the assessee has incurred a huge loss is not permissible to reject the books of accounts and estimate the income by the Assessing Officer. The revenue has also not disputed that the price charged by the assessee in the earlier assessment year for the year under consideration under and subsequent assessment year the same agreement, then the action of the Assessing Officer is not warranted to reject the books of accounts. In view of the above facts and circumstances of the case, we do not find any merit or substance in the appeal of the revenue, the same deserves dismissal.”

4.2 In view of the above order of the Tribunal in assessee's own case for assessment year 2010-2011 (supra), which is identical to the facts of the instant case, we follow the coordinate Bench's order of the Tribunal and hold that the CIT(A) is not justified in confirming A.O.'s action in rejecting the books of account and estimating the business income at the rate of 8%. It is ordered accordingly.

5. In the result, the appeal by the assessee is partly allowed.

Order pronounced on this 27th day of October, 2017.

Sd/-
(Jason P.Boaz)
Accountant Member

Sd/-
(George George K.)
JUDICIAL MEMBER

Bangalore ; Dated : 27th October, 2017.
Devdas*

Copy of the Order forwarded to :

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

True copy

BY ORDER,

(Asstt. Registrar)
ITAT, Bangalore