

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC", BENCH MUMBAI
BEFORE SHRI R.C.SHARMA, AM
ITA No.5993/Mum/2017 to 5997/Mum/2017
(Assessment Year :2007-08, 2009-10, 2010-11, 2011-12 & 2012-13)

M/s. Mahindra Telecommunications Investment Pvt. Ltd., (Formerly known as Mahindra Air Services Ltd., Gateway Building, Apollo Bunder Mumbai – 400 001	Vs.	ITO –Range – 2(2)(3), Mumbai
PAN/GIR No. AAACM3774E		
Appellant)	..	Respondent)

Assessee by	Shri Prasad Bapat
Revenue by	Shri Ram Tiwari
Date of Hearing	22/11/2017
Date of Pronouncement	19/02/2018

आदेश / O R D E R

PER R.C.SHARMA (A.M):

These are the appeals filed by the assessee against the order of CIT(A)-5 dated 06/06/2017 for A.Y.2007-08, 2009-2010, 2010-11, 2011-12 and 2012-13 in the matter of order passed u/s.143(3) of the IT Act.

2. Common grievance of assessee in all the years relates to reopening of assessment u/s.147 and confirming the addition on account of interest on capital contributed by the assessee company in share of another company.

3. At the outset, learned DR placed on record the order of the Tribunal in assessee's own case wherein issue has been decided against the assessee. Learned AR fairly conceded the same.
4. I have gone through the orders of the authorities below and found from record that assessee is engaged in the business of telecommunications field e-return on 07/10/2010 declaring the income at Rs.NIL. Return was processed u/s. 143(1) of the IT. Act. The case is reopened on the basis of issue decided for the A.Y. 2008-09.
5. By the impugned order CIT(A) upheld the reopening as well as addition made by the AO after observing as under:-

6. *With regard to assessment of interest income that 11% compounded annually on the value of this capital investment in shares of AT & T Global Network Services India P. Ltd. which is added to the total income on accrual basis. This is a recurring issue in the appellant's case in ITAT in the A.Y. 2008-09. Examining This issue in ITAT order ITA No.2832/Mum/2012 held as under :-*

"The assessee following the accrual method of accounting for finalizing its accounts as well as reporting income -being in fact legally obliged to do so, the said concept, i.e., accrual, a fundamental accounting assumption - so that the accounts cannot be considered as reflecting a true and fair state of affairs until the same is adopted, was examined in light of the judicially precedents and Accounting Standards, since legally mandated. Only to find a complete harmony between the two. i.e. as judicially explained and as defined in accountancy, the commercial principles of which would even otherwise hold in the absence of anything to the contrary under the statute. The question to examine is if the right to receive the return (or income) on the shares had accrued to the assessee during the relevant year. The same flowing from the shareholder's agreement entered into by it with a parent (foreign) company of the investee-company, a resident, the said agreement stands examined in detail, even

as no dispute or doubt with regard to the scope or meaning of its provisions is available on record, i.e., only with a view to ascertain the nature of the rights accruing to or vesting in the assessee per the same. The Agreement was found to unequivocally and unambiguously convey the right to receive the return on its investment (in shares) to the assessee-company further, that income therefore accrued to it in the same manner to the same extent as the increase in the value of its' share in the investee-company, at a defined rate per unit of time over holding period, which was further fixed at a minimum of three years (or such lower time) as occasioned by the elimination of the Indian Government regulation on foreign equity holding levels. This is as the assessee had an irrevocable right to transfer, and the company (AT & T) an irrevocable right to acquire the assessee's shareholding in its Indian subsidiary (AT & T India) either to itself or through its affiliates (which have right to first refusal), at a predetermined price, called option price, which shall continue to increase with time, i.e. at the defined rate (11% p.a.) to be compounded annually, so that the agreed return shall continue to obtain, resulting in a continuous growth in option price over time. The transfer of shares in the manner afore-said, including the price determined thereunder, is made the essence of the agreement, so that any contravention thereof constitutes a breach thereof, which may result in its termination. The assessee-company, which has no right to management, cannot sell, assign, transfer or otherwise dispose of its shares (or interest therein) in any manner, or otherwise encumber the same in any manner. The assessee's investment in shares, has to be considered in conjunction with the said agreement, being in fact itself only pursuant thereto, i.e. having regard to the reality and the entirety of the facts and circumstances of the case. The same, as evident, is qualitatively very different from the shareholding of, or the rights as a shareholder of AT & T. The provision of 'call option fee' and 'compounding' in the Agreement are considered inconsistent with investment: in shares proper. It is the substance that is to prevail over form. The arrangement

is accordingly found to be the only a manner of investment, akin to a financing arrangement, yielding return (income) as a function of time. No doubt or uncertainty with regard to the realization or the ultimate collection of the income by way of option price on transfer of shares, obtaining (i.e., reckoned in a realistic manner), the income (by way of return on investments in shares) is found to have accrued by way of inflow of or giving rise to a receivable. The arrangement is in fact AT & T not requiring any financier, but entering the arrangement all the same only to comply with the GOI policy as to a cap on the foreign equity participation in the telecom sector for the time being, not even a financing arrangement. The agreement and the rights accruing thereby was further examined from the stand point of and in the light of a provision of the compound rate of return (on annualized basis -so that the same increases in geometric progression with time), discounting for net present value, only to find further endorsement of the said view and, further, of nor impacting the valuation (of the right to receive) or the accrual of the income in any manner. Even de hors the character of the arrangement as a financing arrangement or any other, the nature of the investment would not be of much consequence as long as there is accrual of income in the facts and circumstances of the case, i.e. by way of right to receive- a receivable, resulting in a debt, realizable even if in future.

*The right to receive, if construed as a right to receive in praesenti, it may be appreciated, would obliterate the difference between the 'right to receive' and 'due for payment'. Or in the fact between 'accrual' and 'receipt', used in contradistinction, even as explained in Ashokbhai Chimanbhai (supra). It is only the realizabiitiy of the right accrued that is postponed to a later defined date, signified as the due date, which is at convenient **or agreed** dates of time. It is only because the debt has arisen and accrued that it becomes liable to be realized, even if at a later date. That in fact, forms the fundamental or the quintessential difference' between cash and accrual systems of accounting, legally recognized and judicially well explained. Ii: would, as such, be incorrect to say i.ha': the right (to receive) that vests in the assessee with a*

passage of time is not a legally enforceable right. It is, further, only when the said right to receive culminates under the terms of the agreement into a realizable right, i.e., which is by a defined date arid for a definite sum, that it can be said to mature for payment in favour of the recipient of income. It is only upon this that, where not (being) received, despite the compliances with the stipulations made in its respect by the assessee, that the right can be legally enforced by it. Of-course, whether the income at a definitive rate has been earned and, accordingly, accrued, is itself a subject matter of dispute, i.e. under the terms of the arrangement/contract, the same can be subject to judicial determination. How, then, it is wondered, has the income not accrued or arisen to or, correspondingly, the right to receive not vested in, the assessee - a question which, being a mixed question of fact and law, has to considered on a realistic assessment and consideration of the entirety of the facts and circumstances of the case, with we observing no dispute as regards facts. The fact that the income is realizable as a part of the sale price of shares, i.e. an investment by the assessee, a investment company, as a part of and in regular course of its business, to fetch return, i.e. along with redemption or liquidation of the investment, as only representing the form in which the income, imbedded in the increased share value, is realized. The same is only a manner of realization of the income, since accrued, as is the case (in other common day examples of) with interest on (cum) debentures or Bank FOR, et. al. and, thus by itself of little moment. Could be material one may ask if the interest of Debenture or FOR stands to be received, over the tenure of the investment, separately, or along with redemption of the investment? The increase in the share price to the defined extent would arise irrespective of the performance of the company during the holding period or its' intrinsic value (net worth) at the time of transfer of shares. Would it therefore matter even if (say) some management rights were also attached to the shareholding - which we observe as not. In our view - not. The investment is in a private company-, shares in which are severely restricted for transfer, making it highly illiquid, i.e. but for the arrangement, in pursuance to which only in

fact the investment in shares stands made. That is, considerable uncertainty would otherwise exist as to the readability of the income. The income being also in agreement with the matching principle of accountancy, also judicially approved, is thus found to accrue from year to year, i.e., on time basis and, thus, for the relevant year. The same, further, is only by way of business income, i.e. as assessed, on which we again observed no dispute; rather, the two returns ensuing on investment, i.e. by way of call option fee (returned and assessed as business income) and the annualized return (over the holding period), found to be para materia, forming part of an integrated revenue model and, further, only in the nature of interest income as defined both in the accountancy as well as by statute. There is no law that interest could be assessed only as 'income from other sources', partake as it does its' character from the underlying transaction from which it arises (CIT vs. Govinda Choudhury (1993)203 ITR 881 (Supreme Court). The case law cited stands also considered, only to find the same to be in agreement with the view expressed herein, confirming the stand of the Revenue, being essentially a question of fact, to be determined on an appreciation of the facts of the case, with the law being well settled. Finally, we observe the income arising has not been worked out by the A.O. in the manner provided for in the agreement, i.e. @ 11% p.a.compounded annually with reference to the date of the investment. The A.O. shall do so, of-course after allowing opportunity to present its working with regard thereto and consider the same. We consider ourselves competent to issue such a direction (refer : Ahmedabad Electricity Company Ltd. vs. OT[1993]199 ITR 351(Bom))”

6. The facts and circumstances during the years under consideration are parameteira, respectfully following the order of the Tribunal as quoted by CIT(A), I do not find any reason to interfere in the order of the lower authorities.

7. In the A.Y.2012-13, addition was made on account of interest income, it was contention of learned AR that interest income was also offered by the assessee in its return of income whereas AO has again made addition under the head 'income from other sources' which amounts to double taxation of the same income. In the interest of justice, I restore this issue back to the file of the AO to verify and for deciding afresh. If the AO finds that the interest income has already been offered by the assessee, no further addition is required on account of such income. I direct accordingly.

8. In the result, all the appeals of the assessee are dismissed except for A.Y.2012-13 which is allowed in part for statistical purposes in the terms indicated hereinabove.

Order pronounced in the open court on this 19/02/2018

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 19/02/2018

Karuna Sr.PS

Copy of the Order forwarded to :

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

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai