

आयकर अपीलिय अधिकरण “के” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “K” BENCH, MUMBAI
BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAVISH SOOD, JM

आयकर अपील सं./I.T.A. Nos. 4829 & 4830/Mum/2015
(निर्धारण वर्ष / Assessment Years: 2009-10 & 2010-11)

DSV Air & Sea Private Limited B-201, The Qube, Off International Airport Road, M. V. Road, Marol, Andheri (E), Mumbai-400 059	बनाम/ Vs.	Dy. CIT, Circle-9(3)(1), Aaykar Bhavan, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AACCD 3848 A		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri M. P. Lohia & Shri Nikhil Tiwari
प्रत्यर्थी की ओर से/Respondent by	:	Shri V. Jenandhanan

सुनवाई की तारीख / Date of Hearing	:	27.02.2018
घोषणा की तारीख / Date of Pronouncement	:	07.03.2018

आदेश / ORDER

Per Bench:

These appeals by the assessee are against the respective orders of the Id. Commissioner of Income Tax (Appeals) for the assessment year 2009-10 and 2010-11 respectively. Since the grounds taken are common and the issues are connected, these have been consolidated and disposed of by this common order.

2. The grounds of appeal read as under:

General Ground

1. erred in confirming the action of the learned Assessing Officer ('AO') in determining the total taxable income of the Appellant at Rs 86,98,350 as against the returned income of Rs 7,42,277;

Reference made to the Transfer Pricing Officer

2. erred in confirming the action of the learned AO in referring the Appellant's case to the

learned Transfer Pricing Officer (TPO) under Section 92CA(1) of the Act, and then making a transfer pricing adjustment of Rs 39,64,096 to the total income without satisfying the conditions specified therein;

Management Fees

3. erred in confirming the action of the TPO in determining the value of management services received at Rs Nil, as against payment of Rs. 39,64.096 made to by the Appellant to its Associated Enterprise ('AE') in Denmark;

4. erred in ignoring the details submitted and questioning the benefits received by the Appellant in respect of the management services received from its AE;

One of the prescribed methods to be used

5. erred in law in not determining arm's length price of the international transaction of payment of management fees using one of the methods prescribed under Section 92C of the Act read with Rule 10B of the Income Tax Rules, 1962 ('Rules');

Powers of the TPO

6. erred in upholding the action of the TPO of determining the value of the management services as nil holding that no benefit has been received by the Appellant, which is in effect beyond the power; since the TPO's power is restricted to determining the arm's length price of the said international transaction and not questioning the benefit test/ commercial expediency;

Rejection of Additional Evidence

7. erred in rejecting the additional evidence submitted by the Appellant on procedural grounds (stating that the same is not in the form of additional evidence) without appreciating the fact that the Appellant was prevented from filing the evidence as sufficient opportunity was not provided and the Appellant has, in substance, complied with Rule 46A of the Rules;

Disallowances under Section 40(a)(ia) of the Act

8. erred in confirming the disallowance of Rs.3,33,795 paid to Neptune Shipping Company Pvt. Ltd. ('NSCPL') without appreciating the fact that appropriate taxes have been deducted and deposited into the Government Treasury on the said payment;

9. erred in confirming the disallowance of Rs 2,82,227 paid to Saisea Logistics (I) Pvt. Ltd.

('SLIPL') without appreciating the fact that taxes were not withheld on such payments based on the 'Nil' tax withholding declaration obtained from SLDPL; 10. erred in confirming the disallowance of Rs 2,60,821 in respect of Bosch Rexroth India

Limited, Rs.3,70,411 paid to Indo Saudi Services (Cargo) Pvt. Ltd. and Rs.3,06,526 paid to AFL Pvt. Ltd., disregarding the submissions made by the Appellant before the Hon'ble CIT(A) for non-disallowance of the said amounts; Wrong addition of fringe benefit tax

11. erred in adding the fringe benefit tax amounting to Rs.8,28,728, without appreciating the fact that the same has not been claimed as a deduction by the Appellant while computing the total income for the subject AY;

Lew of interest under Section 234B of the Act

12. erred in levying interest under Section 234B of the Act;

Initiation of penalty proceedings under Section 271(l)(c) of the Act

13. erred in initiating penalty proceedings under Section 271 (IXc) of the Act.

Each of the above ground is independent and without prejudice to one another. The Appellant craves leave to add, to alter, to amend or to delete any or all of the above grounds of appeal, at or prior to hearing of the appeal so as to enable the Income Tax Appellate Tribunal to decide the appeal according to law.

The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the facts and circumstances of the case.

Apropos common issue regarding payment made towards allocation of group management cost:

3. On this issue at the outset, the Id. Counsel of the assessee submitted that identical issue was considered by this tribunal in earlier year, wherein as in current assessment years, additional evidence on this issue were rejected by the Id. Commissioner of Income Tax (Appeals). It was submitted that this tribunal in assessee's own case in ITA No. 409/Mum/2015 for the assessment year 2008-09 vide order dated 20.04.2016 had decided the issue as under:

5. We have heard the rival submissions and perused the material before us. In our opinion, before deciding the grounds of appeal on merits, the issue of admission of additional evidences has to be adjudicated. We find that during the appellate proceedings, the assessee had submitted certain details with

regard to TP adjustments. In our opinion, these details would be helpful in deciding the appeal. The proper course of disposing the first appeal would have been to refer the additional evidences to the TPO/AO and to call for a remand report. But, the FAA rejected the request of the assessee for admitting the additional evidence. In our opinion, the assessee has been penalised enough for not submitting the papers before the TPO. But the principles of natural justice demand that only due taxes should be collected and for that all the evidences should be considered. In the case of *Avan Gidwani*(supra),the Tribunal has held that Rule 46A of the Income tax Rules could not overrule the basic principles of natural justice. Considering the peculiar facts and circumstances of the case, we are of the opinion that matter should be restored back to the file of FAA for admitting the additional evidences, submitted by the assessee for deciding the matter afresh. As we are setting aside the order of the FAA, we are not deciding the other issue raised by the assessee. The FAA may also direct the AO to give credit of tax deducted at source(GOA 7).

4. In the present case also there has been an issue of admission of additional evidence which has been rejected by the Id. Commissioner of Income Tax (Appeals) on the same lines. Since ITAT in assessee's own case has remitted the matter to the Id. Commissioner of Income Tax (Appeals) for admitting the additional evidences and deciding the matter afresh, we also remit this issue to the file of the Id. Commissioner of Income Tax (Appeals) with a similar direction. Both the counsel fairly agreed to this proposition.

Apropos the issue of disallowance u/s. 40(a)(ia) in assessment year 2009-10:

5. On this issue also the Id. Counsel of the assessee pointed out that the assessee has made elaborate submissions including additional details before the Id. Commissioner of Income Tax (Appeals), who summarily upheld the Assessing Officer's order without dealing with the assessee's submission.

6. Both the counsel fairly agreed that since the common issue is being remitted to the Id. Commissioner of Income Tax (Appeals), this issue may also be remitted. Accordingly, we remit this issue also to the file of the Id. Commissioner of Income Tax (Appeals). The Id. Commissioner of Income Tax (Appeals) shall consider the issue afresh and pass a speaking order on the assessee's submission. Needless to add the assessee should be given an opportunity of being heard.

7. In the result, the appeals are allowed for statistical purposes.

Order pronounced in the open court on 07.03.2018

Sd/-
(Ravish Sood)

न्यायिक सदस्य / Judicial Member

Sd/-
(Shamim Yahya)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 07.03.2018

व.नि.स./Roshani, Sr. PS

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

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

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai