

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI**

**BEFORE SHRI R. K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No. 4082/Del/2016 (A.Y 2007-08)

Stanley Consultant India Pvt. Ltd. Unit No. 405, A & B, Rectangle One. D4, 4 th Floor, Saket District Centre New Delhi AAHCS6192D (APPELLANT)	Vs	DCIT Central Circle 9(1) New Delhi (RESPONDENT)
---	----	---

Appellant by	Sh. Manoneet Dalal, CA
Respondent by	Sh. S. S. Rana, CIT DR

Date of Hearing	05.09.2018
Date of Pronouncement	07.09.2018

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 16/2/2015 & 24/03/2015 passed by CIT(A)-XXIV, New Delhi for Assessment Year 2003-04.

2. The grounds of appeal are as under:-

1. *On the facts and circumstances of the case and in law, the order under section 250(6) passed by the CIT(A) is bad in law and void-ab-initio.*
2. *On the facts and circumstances of the case and in law, the CIT(A) has erred in confirming the penalty levied by Deputy Commissioner of Income-tax, Circle 9(1), New Delhi ("AO") under section 271(l)(c) of the Act without recording adequate satisfaction during the course of assessment proceedings*
3. *On the facts and circumstances of the case and in law, the CIT(A) / AO erred in levying penalty under section 271(l)(c) of the Act in relation to transfer pricing additions made in the assessment order.*

4. *On the facts and circumstances of the case and in law, the CIT(A) / AO erred in levying penalty in relation to mere difference of opinion as regards arm's length nature of a particular transaction under Section 92 of the Act.*

5. *On the facts and circumstances of the case and in law, the learned CIT(A) / AO has erred in holding that the appellant has not acted in good faith and has not exercised due- diligence.*

6. *On the facts and circumstances of the case and in law, the CIT(A) / AO erred in not appreciating that the appellant had disclosed all material facts relating to the adjustment and hence no penalty ought to be levied.”*

3. While completing assessment u/s 143(3) r.w.s. 147 on 03/02/2011, the following three additions were made by the Assessing Officer:-

- i) Addition on a/c of Arms Length Price by TPO Rs.2,96,58,519/-
- ii) Addition on a/c of TDS Rs. 6,53,850/-
- iii) Disallowance on a/c of meeting & Seminar exp. Rs.4,00,000/-

Aggrieved by the order of the Assessing Officer, the assessee went in appeal before the CIT(A) vide its order dt. 30/04/2012 who confirmed first two additions at serial no 1 and 2 above and deleted the addition at serial no 3. During the penalty proceedings, the Assessing Officer after issuing the show cause levied penalty at Rs. 1,03,03,174/- u/s 271(l)(c) on the concealment of income amounting to Rs. 3,03,12,369/- being total of addition on account of arm's length price as determined by the TPO and all addition on account of TDS after issuing show cause.

4. Being aggrieved by the penalty order, the assessee filed appeal before the CIT(A). The CIT(A) dismissed the appeal of the assessee.

5. The Ld. AR submitted that the quantum appeal on which the penalty is imposed has been allowed in favour of the assessee by the Tribunal in ITA No. 3336/Del/2012 vide order dated 25th July, 2016 and the consequential order in respect thereto has been passed by the Assessing Officer on 26/12/2017.

Thus, the penalty does not survive.

6. The Ld. DR relied upon the penalty order and the order of the CIT(A).

7. We have heard both the parties and perused the relevant material available on record. In the quantum appeal, the Tribunal vide order dated 25th July 2016 held as under:-

“7. We have noted, as rightly pointed out by the learned counsel, that in the immediately preceding assessment year as also in immediately succeeding assessment year, the TPO himself has accepted the segmental results, as shown By the assessee on the same lines as in this assessment year, without any adjustments. No doubt, there is no res judicata in the income tax proceedings, but there has to consistency in approach about such a fundamental aspect which permeates from year to year. We have also noted that the basic reason for rejecting the segmental results in this year is that there were no separate streams of revenues so far as non -project expenses are concerned. However, it is important to bear in mind the fact that whether or not there are existing separate streams of revenue for non-project expenses is wholly irrelevant because what is material is whether the expenses is incurred for a distinct purposes, other than the that of project in question, or not. Once we come to the conclusion that the apart from doing the project work in question, the assessee was also making efforts to develop its separate business, as an entrepreneur, and whole or a significant part of the non project expenses are incurred for such a purpose, the exclusion of whole of, or such significant part of, non-project expenses is fully justified. In case the assessee has to bear the expenses incurred by it, as an entrepreneur, for business development expenses, taking into account such business development expenses, for the purpose of computing operating profits from the business activity of providing these technical services in question, will make the assessee inherently incomparable. It is not even the case of the

revenue that the assessee is a captive service provider forbidden from rendering such services to other entities. If that be the case, the idle capacity risk must also go to the AE, but then that is not the case here. It is also elementary that nobody can be expected to prove a negative. The TPO was, therefore, clearly in error in observing that the assessee could not prove that the head non-project expenses, were not work. There is no, and cannot be any, costs, on a fixed ratio basis, between the project costs and non project costs- save and except for the identification on item to item, i.e actual, basis. That is precisely what the assessee has done. The detailed basis of allocation in respect of each item has been set out, and the TPO has not dealt with these specific allocation basis. Similarly, the basis of allocation cannot be found in the agreement and the Memorandum of Association or Articles of Association either. The observations made by the TPO are thus wholly unsustainable in law and inappropriate to the facts of the case. As a matter of fact, as subsequent results (set out at page 206 of the paper-book) would show, the assessee was indeed able to develop substantial business from non AEs. In the subsequent assessment years, the percentage of business with non AEs vis-a-vis total business increased to 31% (AY 208-09), 53% (AY 2009-10) and 59% (AY 2010- 11). The inferences drawn by the TPO are incorrect and quite clearly the assessee was not doing a simple support service per se for the project work undertaken by its AEs. The assessee did act as an entrepreneur and developed this field quite substantially, and the segmental approach of the assessee has been accepting in preceding and succeeding assessment year as well. On these peculiar facts, the approach of the assessee, in treating project work as separate profit centre, is justified. The plea of the assessee was, therefore, indeed well taken and we approve the same. With these observations, the matter goes back to the TPO for reexamination of the matter. As the matter is going back to the file of the TPO, and as it is uncontroverted stand of the assessee that in the event of this basic plea being accepted, all other issues, with respect to ALP determination, will be rendered

infructuous and academic, we see no need to deal with other issues, on ALP determination, raised by the assessee.

8. *That takes us to the second issue with respect to disallowance under section 40(a)(i). There is no dispute that this amount of 6,53,850 on account of recruitment charges reimbursed to the Stanley Consultancy Inc. The Assessing Officer has disallowed the payment on the ground that no tax was deducted at source from this reimbursement which was clearly taxable in India under section 9(1). In appeal, learned CIT(A) has confirmed the same. The assessee is aggrieved and is in further appeal before us.*

9. *Having heard the rival contentions, and having perused the material on record, we find that the disallowance is wholly uncalled for. The requirements of tax deduction at source under section 195 do not come into play simply because an amount is being remitted abroad. The income embedded in such a payment must also be taxable in nature, and unless that is established, the tax deduction at source requirements do not come into play. Here is a case in which the payment is in the nature of reimbursement to a US resident, but even if we go by nature of expenses, recruitment fees, by the virtue of Article 12(4)(b) of India US tax treaty, is not taxable in the source country since it does “make available’ technical knowledge, experience, skill, know-how, or processes or consist of the development and transfer of a technical plan or technical design”. Since the income embedded in the payment was not taxable in India under the treaty provisions, and since treaty provisions override the provisions of the Income Tax Act- unless the latter was beneficial to the assessee, the tax withholding requirements of Section 195 were not triggered on the facts of this case. Since the assessee did not have any tax withholding obligations, non-deduction of tax at source by the assessee cannot lead to any disallowance under section 40(a)(i). We, therefore, delete the impugned disallowance.*

10. *The assessee thus succeeds on the second issue.”*

The order giving effect to the Tribunal's finding has also revealed that the assessee's income has been assessed at Rs.(-) 1,21,79,918/-. Thus, there the penalty does not survive as the original quantum order has been quashed by the Tribunal. Therefore, appeal of the assessee is allowed.

8. In result, the appeal of the assessee is allowed.

Order pronounced in the Open Court on 07th September, 2018.

Sd/-

(R. K. PANDA)
ACCOUNTANT MEMBER

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Dated: 07/09/2018

*R. N

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	05.09.2018
Date on which the typed draft is placed before the dictating Member	06.09.2018
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.	

PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	7.09.2018
Date on which the final order is uploaded on the website of ITAT	7.09.2018
Date on which the file goes to the Bench Clerk	7.09.2018
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	