

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, JUDICIAL MEMBER
AND SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

ITA No.984/Bang/2010
Assessment year : 2002-03

Engie Energy and Services India Pvt. Ltd., (formerly GDF Suez Energy India Pvt. Ltd.), Srinivas and Badri Counsels, 25/3, 2 nd Floor, Lavelle Road, Opp. Nitesh Buckingham Gate, Ashok Nagar, Bangalore – 560 001. PAN: AA ACT 5405D	Vs.	The Assistant Commissioner of Income Tax, Circle 3(1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri A. Shankar, Advocate
Respondent by	:	Shri Biswaranjan Sasmal, CIT

Date of hearing	:	12.03.2019
Date of Pronouncement	:	15.03.2019

ORDER

Per N.V. Vasudevan, Judicial Member

This appeal by the Assessee is directed against an order dated 24.06.2010 of the CIT(Appeals)–IV, Bangalore. Originally this appeal together with the appeal by the Revenue being ITA No.1030/Bang/2010 against the very same order of CIT(A) was heard and decided by this Tribunal by order dated 25.7.2016. Later the Assessee filed M.P.No.15/Bang/2017 & M.P.No.165/Bang/2017 praying that certain grounds raised by the Assessee was not adjudicated by the Tribunal and

those grounds should be heard and adjudicated. The Tribunal vide order dated 27.3.2017 & 13.9.2017 respectively directed that grounds No.2,3, 6, 7 & 10 of the concise grounds of appeal filed by the Assessee were omitted to be adjudicated by the Tribunal and accordingly directed that the appeals be fixed for hearing for the limited purpose of adjudicating the aforesaid grounds of appeal. This is how the appeal by the Assessee is now fixed for hearing before us for the limited purpose of adjudicating grounds No.2,3, 6, 7 & 10 of the concise grounds of appeal raised by the Assessee in its appeal.

2. Grounds 2,3,6,7 & 10 of the concise grounds of appeal raised by the Assessee reads thus:-

“2. The learned CIT(A) erred in not holding that the ACIT erred in making a reference to the Additional Director of Income-tax (Transfer Pricing) Bangalore (‘TPO’), and that the order of the TPO was without jurisdiction.

3. The learned CIT(A) failed to appreciate that it is not in accordance with law for the TPO to make comments/arguments on the taxability of a transaction when her scope was to deal with transfer pricing matters only and not beyond.

6. The learned CIT(A) erred in holding that the Appellant was a conduit only for avoidance of taxes by Suez Tractebel S.A.(STSA). Without prejudice, after holding that the Appellant was a conduit for the avoidance of tax by Suez Tracetebel S.A., the learned CIT(A) erred in not determining the taxable capital gains in the hands of the Appellant at Rs.Nil.

7. The learned CIT(A) was not justified in holding that the entire transaction was structured to evade tax on the alleged income of Rs.32.02 Crores by Suez Tracetebel S.A. The CIT(A) has further erred in confirming the addition made by the Assessing Officer of a sum of Rs.96.90 Crores in the hands of the Appellant, which is three times the alleged income itself.

10. The learned CIT(A) erred in confirming the levy of interest under Sec.234B of the Act upon the appellant and failed to appreciate that the interest under section 234B of the Act, if any, ought to be computed at 1% per month, being the rate prevailing on the date of passing of the assessment order. He further erred in not holding that interest leviable, if at all, ought to be computed with reference to returned income and further the period for which the same has been levied is not in accordance with the provisions of the Act.”

3. The Assessee is a 100 % subsidiary of one M/s. Tractebel S.A., Belgium [hereinafter referred to as “TSA”]. M/s. TSA and a business group called ‘Jindal Group’ had floated a joint venture company called Jindal Thermal Power Company Ltd, (‘JTPCL’ in short). Both TSA and Jindal group were having 50% equity shares such in this joint venture company. Such 50% holding was represented by 14,45,00,000 nos. of equity shares of face value of Rs.10/- each. There was a shareholders’ agreement between the two joint venture partners which *inter alia* stipulated mode of transfer of share capital of either party, manner of management of the joint venture company, methodology for reimbursement of expenditure incurred by TSA and methodology for resolution of disputes. After floating the joint venture company, namely JTPCL, M/s. TSA entered into two agreements on 21.04.1994 with them, one for engineering assistance and the second for legal and financial assistance. As per the first agreement TSA was to provide engineering assistance to JTPCL, in relation to a contract for erection and commissioning of power plant at Toranagallu, in Karnataka State which was tendered by JTPCL. For services rendered by TSA, the fees that was required to be paid by JTPCL was also specified. The second agreement was for legal and financial assistance. As per this agreement, TSA was to pay the professional fees of a financial advisor named M/s. Herberth Smith (In short “HS”) and such legal fees paid by TSA to HS was to be reimbursed by JTPCL. The power project which

JTPCL had contracted was eventually erected and commissioned by M/s. JTPCL. TSA raised invoice on M/s. JTPCL for payment against engineering services rendered by them and also for reimbursement of legal and financial charges paid by it to the advisors.

4. Disputes arose between TSA and Jindal group on the above billings done by M/s. TSA on M/s. JTPCL. TSA initiated arbitration proceedings against Jindal group before the International Chamber of Commerce, alleging violation of shareholders' agreement, engineering assistance agreement and legal and financial agreement. Jindal group also filed counter claims before the International Chamber of Commerce, for alleged delay on the part of TSA in rendering services agreed by them. As per Jindal group, as a result of the delay it suffered losses. Thereafter a settlement was reached between the warring joint venture partners on 13th September, 2001. Through this settlement agreement, Jindal group agreed to buy out the shares held by TSA in JTPCL. In lieu, M/s. TSA was to receive the settlement amount agreed by the parties.

5. Assessee, a subsidiary of M/s. TSA in India was appointed to act as an intermediary for the sale of shares held by M/s. TSA to Jindal group. Amount agreed by the parties as value of the shares was USD 55 million (Which was later reduced to USD 50.5 million, equivalent to Indian Rs.261,03,00,000/-). Assessee after acquiring the shares of M/s. JTPCL from M/s. TSA was to transfer such shares to companies in the Jindal group and certain financial institutions, recouping the cost incurred for acquiring such shares.

6. On 14.09.2001 assessee and its principal TSA filed an application before the RBI seeking approval for transfer of shares of 14,45,00,000/- equity shares to the assessee company. As per this application, assessee,

the buyer of the shares was to pay Rs.18.06 per share to M/s. TSA. Reason cited for the sale was TSA's desire to exit the Joint venture. For justifying the sale price of Rs.18.06 per share, valuation reports of one M/s. Lodha & Co., CAs, and one M/s. A. K. Jhunjhunwala & Co., were filed. These experts had valued one equity share of JTPCL at Rs.28 and Rs.28.52 per share respectively. Methodology adopted by them for valuation was capitalisation of future profits. Transfer of shares was approved by RBI on 25.09.2001. Accordingly, TSA transferred 14,45,00,000 equity shares to the assessee. The actual price was revised in December 2001 to USD 50.50 million, through another multi-party agreement dt.12th December 2001 between TSA and Jindal Group. Parties to this agreement were as under :

1. Tractebel SA
2. Taxpayer, Tractebel Energy South Asia Private Ltd ICICI Ltd (ICICI)
3. Industrial Development Bank of India (IDBI)
4. Sun Investment Ltd (SUN)
5. Gagan Trading Company Limited (GAGAN)
6. Vrindavan Services Limited (VSL)
7. Jindal Vijayanagar Steel Limited
8. Jindal Strips Limited
9. Jindal Iron & Steel Company Limited
10. Mr. Sajjan Jindal
11. Mr. Prithviraj Jindal
12. Mr. Ratan Jindal
13. JTPC

7. Assessee after acquiring 14,45,00,000 equity shares in JTPCL from TSA for USD 50.50 million was in turn, by virtue of the multi-party agreement, required to sell it to the following parties for the consideration mentioned against each :

Buyer	No. of shares	Price
ICICI	55,000,000	Rs. 550,000,000
IDBI	55,000,000	Rs. 550,000,000
VSL	7,685,000	Rs. 295,000,000
GAGAN	7,035,000	Rs. 270,000,000
SUN	19,780,000	An amount of Rupees necessary to (i) buy US dollars equal to the Settlement Amount on the Closing Date and (ii) pay all related transaction costs, minus the amounts paid by ICICI , IDBI, VSL & GAGAN
TOTAL	144,500,000	Rupee Settlement Amount

8. When the shares were transferred by M/s. TSA to the assessee, assessee collected the above sum from the above parties and paid it to M/s. TSA. In turn, it transferred the shares to the respective parties.

9. Assessee in its return of income filed for assessment year 2002-03 declared long-term capital gains (LTCG) of Rs.49,41,79,382/- from the acquisition and transfer of shares of M/s. JTPCL. For working out this LTCG, the assessee adopted the original cost of Rs.10/- per share, which was the face value paid by the respective parties when they formed the

Joint venture company, JTPCL. Assessee indexed the cost to Rs.192,03,52,868/-, while working out the LTCG. Assessee claimed exemption u/s.10(23G) of the Act for such amount. As per the assessee by virtue of Section 49(1)(iii) of the Act, the cost of acquisition of an asset by a parent company was to be taken as cost of acquisition for the subsidiary. Further as per the assessee by virtue of Explanation (1)(b) to Section 2(42A) of the Act, where an asset was transferred by a holding company to its wholly owned subsidiary and if the subsidiary company was an Indian company, the period of holding of the asset by the holding company was also to be reckoned for determining the nature of the capital gains.

10. Since the transfer of shares of JTPCL by M/s. TSA to assessee was an international transaction, reference was made by the AO to the Transfer Pricing Officer (TPO) for fixing the Arms Length Price (ALP) of the value of shares acquired by the assessee. The TPO determined the ALP for purchase of shares by the Assessee from M/S.TSA at Rs.10/-. According to him, thus the ALP for 14,45,00,000 equity shares came to Rs.144,50,00,000/-. The price paid by the assessee at Rs.16.71 per share came to 241,45,32,250/- (equivalent to USD 50.50 million). Thus, according to the TPO assessee had paid an excess amount of Rs.96,95,32,250/- over the fair value of the shares. He recommended an adjustment of the above amount in his order u/s.92CA of the Act. TPO also made an observation that assessee's claim of exemption u/s.10(23G) of the Act, may not be correct since the said section only exempted income arising out of long-term investment and the assessee having not held the shares even for one day, the holding could not be considered as investment.

11. The view of the TPO was confirmed by the CIT(A) and also by the Tribunal in its order referred to in the first paragraph of this order.

12. With the above background of facts, we shall now deal with the concise grounds which need to be adjudicated by the Tribunal pursuant to the order in MP No.15 & 165/Bang/2017. Gr.No.2 & 3 of the concise grounds of appeal which requires to be adjudicated is with regard to the validity of reference by the AO to the TPO for determination of ALP of the international transaction and the action of the TPO in making comments about the taxability of the transaction of sale of shares by the Assessee.

13. As far as the validity of reference made by the AO to the TPO is concerned, the learned counsel for the Assessee submitted the basis for making reference to the TPO was not communicated to the Assessee and no opportunity of being heard was given to the Assessee before making such reference. It was submitted that the AO or the TPO did not spell out the reason as to why the determination of ALP is being resorted to in the case of the Assessee. It was submitted that the reliance placed by the revenue authorities on the decision of the Special Bench in the case of *Aztec Software and Technology Services Pvt. Ltd. Vs. ACIT 107 ITD 141(SB)(Bangalore)* was erroneous. It was also submitted that Amendment made to Sec.92CA(4) of the Act by the Finance Act, 2007 implies that the AO was bound to give opportunity of being heard to the Assessee before making reference to the TPO. It was also contended that the AO passed the order giving effect to TPO's order without providing proper opportunity to the Assessee. The TPO passed order on 21.3.2005 while the AO after one hearing passed his order on 28.3.2005.

14. On the above arguments, we find that the CIT(A) has rightly held that there is no provision in the Act which mandates giving of any opportunity to the Assessee before making reference to the TPO by the AO or communicating reasons for making such reference. The Special Bench of the ITAT in the case of *Aztec Software (supra)* has taken the view that

there is no requirement to hear the Assessee or record reasons before making reference to TPO. Sec.92CA(4) of the Act, as it stood prior to amendment by the Finance Act, 2007 read as follows:-

“92CA (4) On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C having regard to the arm's length price determined under sub-section (3) by the Transfer Pricing Officer.”

15. The AO on receipt of a report from the TPO had power to disregard to the ALP determined by the TPO. However with effect from 1st June, 2007, Section 92CA(4) has undergone a change vide Section 33 of the Finance Act, 2007 whereby it has been laid down that the Assessing officer is bound to pass an order in conformity with the ALP determined by the TPO. Amended Section 92CA(4) reads as under:-

"92CA(4) On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C *in conformity with* the arm's length price as so determined by the Transfer Pricing Officer.

(Emphasis supplied)

16. The aforesaid amendment by no stretch of imagination can be said to lay down a condition that an opportunity of hearing has to be afforded by the AO before making reference to the TPO. The Assessee has opportunity before TPO to put forth his case and the all his grievances can be put forth before TPO. Gr.No.2 raised by the Assessee is therefore held to be without any merit.

17. As far as ground No.3 raised by the Assessee is concerned, the argument advanced is with regard to the comments made by the TPO in his order regarding the Assessee's claim for exemption u/s.10(23G) of the Act. This comment of the TPO is qualified by the TPO himself in his order by stating that it is beyond the scope of reference to him u/s.92CA of the Act. It is the plea of the Assessee that the TPO's order influenced the mind of the AO in his conclusion that the Assessee was not entitled to exemption u/s.10(23G) of the Act.

18. We find no merits in this argument advanced by the learned counsel for the Assessee. The AO in his order has given his own reasons for denying exemption u/s.10(23G) of the Act. It cannot therefore be said that the AO was influenced by the observations of the superior officer (TPO) in the order passed u/s.92CA of the Act. Ground No.3 raised by the Assessee is therefore without any merit.

19. As far as Ground Nos. 6 & 7 raised by the Assessee is concerned, the same is in relation to the action of the revenue authorities in terming the Assessee as a mere intermediary (conduit) for avoidance of taxes by TSA and his further conclusion that the entire transaction was structured to evade taxes. The further contention of the Assessee is that if the Assessee is really a conduit then the transaction of sale of shares of JTCPL has to be construed as a sale by TSA to the ultimate transferees and in such case, there is no income which can be assessed in the hands of the Assessee. On this aspect the CIT(A) came to the conclusion that the entire structure of transaction of sale of shares by M/S.TSA through the Assessee was to avoid payment of Rs.32,02,67,019/- which was Fees for technical services payable by JTPCL which was given up by M/S.TSA in the settlement pursuant to which shares of JTPCL were ultimately transferred by M/S.TSA. He held as follows [page-24 of CIT(A)'s order] :-

“..... The appellant has been held to be only a conduit for avoidance of taxes by its parent company in the entire transaction. It is not the case of the AO/TPO that the appellant is a shell or fictitious entity. Thus, the transaction under the Settlement Agreement cannot be treated as between TSA and the ultimate buyers by disregarding existence of the appellant which was very much a party to the said Agreement. In view of this, the sum of Rs.32,02,67,019/- included in the sale consideration of shares received by the appellant (representing “fees for technical services” payable to TSA by JTPCL and substantively assessed in the hands of TSA) is to be assessed protectively in the hands of the appellant. The AO may accordingly; re-compute total income of the appellant while giving effect to this order. In case it is finally held that the said income could not be brought to tax in the hands of TSA, such income will be liable to be charged to tax substantively in the hands of the appellant.”.

20. The CIT(A) has dealt with similar ground raised by the Assessee before him in paragraph 7.3 to 7.3.3 of his order. In short, the reason given by the CIT(A) is that the entire transaction of sale of shares by M/S.TSA through the Assessee (including the settlement) was arranged to avoid taxes legitimately payable by M/S.TSA in India and that is the reason why the determination of ALP of the transaction of purchase of shares of JTPCL by the Assessee from M/S.TSA was required to be determined by the TPO. The expression conduit was used in the context of tax evasion. That does not mean that the Assessee is a pass-through entity. As held by the CIT(A), the transaction of purchase and sale of shares by the Assessee was real and therefore the tax incidence arising from such transactions will have to be given effect to. We therefore concur with the view of the CIT(A) on this aspect. Therefore, there is no merit in Ground Nos. 6 & 7 raised by the Assessee.

21. The next aspect which requires adjudication is ground No.10 which is with regard to the rate at which interest has to be levied u/s.234B of the Act. The arguments advanced on behalf of the Assessee were limited only with reference to the rate at which interest should be levied u/s.234B of the Act. The AO completed the assessment on 28.3.2005. As per Section 234B, as it existed prior to 8.9.2003, the rate of interest was to be charged at a higher rate than 1% and w.e.f. 8.9.2003 the rate of tax was 1%. The AO charged interest u/s.234B at a higher rate for the period prior to 8.9.2003. The plea of the Assessee is that since the order of assessment was passed on 28.3.2005 the rate of tax to be charged should be only 1% for the entire period even prior to 8.9.2003. The plea of the Assessee is supported by decision of Madras High Court in the case of *ACIT Vs, Madura south India Corporation (P) Ltd. 110 ITR 322 (Madras)*. In the aforesaid case, which related to AY 1967-68, the AO completed the assessment on 30-11-1968. The assessee had paid advance tax in excess of the tax ultimately assessed. Consequently, the assessee became entitled to interest on the said excess amount under section 214. The ITO calculated the interest at 6 per cent per annum for the period from 1-4-1967 to 30-9-1967, and at 9 per cent thereafter as per the amendment made by the Taxation Laws (Amendment) Act, 1967 with effect from 1-10-1967. The assessee filed an application under section 154 requesting ITO to rectify his order by calculating interest at 9 per cent for the entire period. The ITO declined to make any rectification. The AAC allowed the claim of the assessee which was confirmed by the Tribunal. On further reference at the instance of the Revenue, the Hon'ble Madras High Court held that the liability to pay interest on the part of the Government and correspondingly the right of the assessee to receive interest arises only when the assessment is completed. So long as the assessment has not been completed, it will not be possible to find out whether the advance tax paid

by the assessee is in excess of the ultimate tax payable by him or falls short of that tax. Consequently, the provisions of section 214 as in force on the date when the assessment is completed will be the only provision that will be applicable with regard to payment of interest on the said excess amount. The Hon'ble Court further held that if the intention of the legislature was to pay interest at 6 per cent, for the period anterior to 1-10-1967, and to pay interest at 9 per cent only for the period on or after 1-10-1967, it would have made specific provision in this behalf. The Hon'ble Court therefore held that Tribunal was right in holding that the increased rate of interest payable under the provisions of section 214, as amended by the Taxation Laws (Amendment) Act, 1967, at 9 per cent was applicable for the period from 1-4-1967 to 30-9-1967. The aforesaid decision supports the plea of the Assessee. The AO is accordingly directed to charge interest u/s/234B of the Act at 1% as claimed by the Assessee. We hold and direct accordingly.

22. The Grounds No. 2, 3, 6, 7 & 10 are decided accordingly as given in this order.

Pronounced in the open court on this 15th day of March, 2019.

Sd/-

Sd/-

(G. MANJUNATHA)
Accountant Member

(N.V. VASUDEVAN)
Judicial Member

Bangalore,
Dated, the 15th March, 2019.

/ Desai Smurthy /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore.