



IN THE INCOME TAX APPELLATE TRIBUNAL
"J" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.7452/Mum./2017
(Assessment Year : 2010-11)

Niko (NICO) Limited
407-411/311, Oberoi Chambers-II
Plot no.645/646, New Link Road
Andheri (W), Mumbai 400 053
PAN - AACCN4403B

..... Appellant

v/s

Dy. Commissioner of Income Tax (I.T)
Circle-3(3)(1), Mumbai

..... Respondent

Assessee by : Shri Vijay Mehta a/w
Shri Anuj Kisnadwala
Revenue by : Shri Sunil K. Jha

Date of Hearing - 04.06.2019

Date of Order - 19.06.2019

ORDER

PER SAKTIJIT DEY. J.M.

Aforesaid appeal has been filed by the assessee challenging the order dated 6th October 2017, passed by the learned Commissioner (Appeals)-57, Mumbai, pertaining to the assessment year 2010-11.

2. The only ground raised by the assessee in the memorandum of appeal reads as under:-

"On the facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) erred in determining arm's length price of Head Office General & Administrative expenses eligible to be claimed u/s 44C of the Act, at ` nil. The appellant prays that the action of the Hon'ble CIT(A) may please be held as bad-in-law and be deleted."

3. Brief facts are, the assessee, as stated by the Assessing Officer, is a company incorporated in Cayman Island and is a tax resident of Cyprus. It has set-up a project office in India. For the assessment year under dispute, the assessee filed its return of income originally on 30th September 2010 declaring loss of ₹ 593,05,17,684. Subsequently, it filed a revised return of income on 29th March 2012, declaring loss of ₹ 630,14,86,530. Since, during the year the assessee had entered into international transactions with its Associated Enterprise (AE), a reference was made to the Transfer Pricing Officer to determine the arm's length price of the international transaction. In course of proceedings before him, the Transfer Pricing Officer found that an amount of ₹ 8,11,47,475, was allocated to the assessee by the AE towards Head Office, General and Administration expenses. Since, as per the provisions of section 44C of the Income-tax Act, 1961 (for short "the Act"), the assessee was entitled for a deduction respect of Head Office expenses, the Transfer Pricing Officer called upon the assessee to justify the incurring of the expenditure. Though, the assessee made elaborate submissions justifying the expenditure, however, the Transfer Pricing Officer did not find the submissions of

the assessee acceptable. The Transfer Pricing Officer observed, the assessee did not furnish the bifurcation, nature of services rendered under various heads, benefit derived by the assessee and whether the fee charged is at arm's length. He observed, the assessee did not furnish the necessary evidences to justify the arm's length nature of expenditure. Thus, ultimately, the Transfer Pricing Officer determined the arm's length price of the Head Office expenditure allocated to the assessee at ₹ nil and suggested an adjustment to the extent of the expenditure allocated. In the course of the assessment proceedings, the Assessing Officer noticed that, though, the Transfer Pricing Officer has determined the arm's length price of the Head Office expenditure, at ₹ nil, in respect of which the assessee could have claimed deduction under section 44C of the Act, however, on verification of the computation of income and Profit & Loss account he found that the assessee has neither debited such expenditure to its Profit & Loss account nor has claimed it as deduction in the computation of income. Thus, he held that no separate disallowance in respect of such expenditure can be made.

4. At the outset, Shri Vijay Mehta, learned Counsel for the assessee submitted, since ultimately there is no addition on account of head Office expenditure in the assessment order, the ground raised is of mere academic importance as it will have no impact on the income

ultimately computed for the impugned assessment year. However, he submitted, the decision on the merits of the issue raised should be left upon for adjudication if it arises in any other assessment year.

5. The learned Departmental Representative agreed with the aforesaid submissions of the learned Counsel for the assessee.

6. We have considered rival submissions and perused material on record and taken note of the factual position relating to the ground raised as it emanates from record. Though, the Transfer Pricing Officer has determined the arm's length price of the Head Office expenditure allocated to the assessee at nil, however, ultimately there is no financial implication on the issue as the assessee had not claimed such expenditure as deduction either in the Profit & Loss account or the computation of income. For the aforesaid reason, the Assessing Officer has also not made any addition in the assessment order. In aforesaid view of the matter, the issue raised in this ground is of mere academic importance, hence, we do not consider it necessary to delve any further into the issue. However, in our view, the merits of the issue i.e., whether the Transfer Pricing Officer is competent to determine the arm's length price of the Head Office, General and Administrative expenditure at ₹ Nil, is an important legal issue which has to be decided keeping in view the provisions of the Act as well as relevant case laws. Therefore, while making it clear that we have not

expressed any opinion on the merits of the issue as raised in this ground, we leave it open for adjudication if the issue arises in assessee's case for any other assessment year in future. With the aforesaid observations, the ground raised is dismissed as infructuous.

7. Besides the aforesaid main ground, the assessee has raised an additional ground vide letter dated 4th December 2018, challenging the levy of interest under section 234C of the Act amounting to ₹ 41,24,175.

8. The issue raised in the additional ground does not require investigation into fresh facts and can be decided on the basis of facts available on record. Therefore, we are inclined to admit the additional ground for adjudication.

9. Brief facts are, while computing the income of the assessee in the final assessment order, the Assessing Officer charged interest under section 234C of the Act for non-payment of installments of advance tax. Apart from filing an application under section 154 of the Act before the Assessing Officer seeking deletion of the interest charged under section 234 of the Act, the assessee also raised the issue before the first appellate authority.

10. After considering the submissions of the assessee, learned Commissioner (Appeals) directed the Assessing Officer to grant relief

to the assessee as per law after verifying the record. Vide order dated 5th June 2018, the Assessing Officer disposed of the application filed under section 154 of the Act. While doing so, he also referred to the directions of learned Commissioner (Appeals) on the issue. Ultimately, the Assessing Officer rejected assessee's claim on the ground that he has not been vested with any power to reduce or waive the interest charged under section 234C of the Act.

11. The learned Counsel for the assessee submitted, the assessee being a company has to mandatorily make payment of tax electronically. Therefore, on the due date of payment of advance tax on 15th June 2009, the assessee sent a request to the bank for payment of advance tax amounting to ₹ 11 crore which was accepted by the Bank. However, due to some technical problem in Reserve Bank of India payment gateway, the payment could not be processed on 15th June 2009, and it was processed on the next day i.e., 16th June 2009. Thus, it was submitted that the delay of one day in paying the advance tax was not attributable to the assessee. Therefore, it cannot be fastened with the liability of paying interest under section 234C of the Act. To substantiate his argument, the learned Counsel for the assessee drew our attention to the relevant documentary evidences placed on record. The learned Counsel for the assessee submitted, since all these evidences were available before learned Commissioner

(Appeals), she should have given a clear direction to the Assessing Officer to delete the interest charged under section 234C of the Act instead of leaving the issue open for decision of the Assessing Officer.

12. The learned Departmental Representative, though, agreed that the delay of one day in payment of advance tax may not be due to the assessee, however, he submitted that the assessee should have filed an appeal against the order passed by the Assessing Officer rejecting the application under section 154 of the Act.

13. We have considered rival submissions and perused material on record. Undisputedly, the interest charged under section 234C of the Act is for one day delay in paying the advance tax for the quarter ending on 15th June 2009. There is no dispute that the assessee being a company is mandatorily required to make payment of tax electronically. As could be seen from the material on record, on 15th June 2009, the assessee made a request to its banker viz. Socite Generale, Nariman Point, Mumbai, for e-payment of advance tax amounting to ₹ 11 crore. It is also evident, assessee's banker also processed the payment of advance tax at the request of the assessee. However, the transaction could not be completed due to a technical glitch at RBI's payment gateway. This fact was communicated to the assessee by its banker. In fact, the banker also issued a certificate to this effect. Thus, from the facts on record it is evident, insofar as the

assessee is concerned, it had made the payment of advance tax on the due date i.e., 15th June 2009. The transaction relating to the aforesaid payment could not be completed on 15th June 2009, for reasons beyond the control of the assessee. Therefore, the delay of one day in making payment of advance tax is not attributable to the assessee. That being the case, levy of interest under section 234C of the Act in the facts of the present case is unjustified. In our view, since all the factual details relating to the payment were available before the learned Commissioner (Appeals), she should have adjudicated the issue on merit instead of directing the Assessing Officer to verify. Accordingly, we direct the Assessing Officer to delete the interest charged under section 234C of the Act. Ground is allowed.

14. In the result, appeal is partly allowed.

Order pronounced in the open Court on 19.06.2019

Sd/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 19.06.2019

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

(Assistant Registrar)
ITAT, Mumbai