

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "A" HYDERABAD**

**BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMEBR**

**ITA No. 382/Hyd/2017
Assessment Year: 2012-13**

&

**ITA Nos. 864 & 865/Hyd/2018
Assessment Years: 2013-14 & 2014-15**

Satyam Venture
Engineering Services Pvt
Ltd., Secunderabad.

vs. ACIT,
Central Circle – 3(2),
Hyderabad.

PAN – AAFCS3287D

(Applicant)

(Respondent)

Assessee by : Shri C.S. Subramanyam
Revenue by : Shri Y.V.S.T. Sai

Date of hearing : 02-04-2019
Date of pronouncement : 01-07-2019

ORDER

PER P. MADHAVI DEVI, J.M.:

All are assessee's appeals for the A.Ys 2012-13, 2013-14 & 2014-15 respectively against the assessment orders passed u/s 143(3) r.w.s 144C(5) of the Act.

ITA No. 382/Hyd/2017, A.Y 2012-13:

2. Brief facts of the case that the assessee company e-filed its return of income for the A.Y 2012-13 on 29.06.2013 declaring a total income of Rs. 28,40,38,800/-

under normal provisions of Income Tax Act and Rs. 7,05,33,184/- under the provisions of Sec. 115JB of the Act. During the assessment proceedings u/s 143(3) of the Act the A.O noticed that the assessee has entered into international transactions exceeding Rs. 50 crores with its associated enterprises and therefore, for the determination of arm's length price of the said transactions, the A.O referred the matter to the TPO u/s 92CA of the Act.

2.1 The TPO, vide orders dated 30.01.2016, suggested certain transfer pricing adjustments. He held the transaction of provision of Information Technology Engineering Services (ITeS in short) to be within (+/-) 5% of the average margin of the comparables and hence he did not propose any adjustment. Further, with regard to reimbursement of expenses also the transaction was held to be at arm's length price. The A.O, thereafter, observed that the assessee has not charged interest on receivables from associated enterprises. The assessee submitted that he did not charge interest on receivables from non-associate enterprises as well, and therefore, the same is treated to be at arm's length price. The TPO, however, did not agree with the assessee and held that the SBI PLR rate

of 14.75% p.a should be the interest chargeable on receivables. Accordingly, he proposed an adjustment of Rs. 75,70,716/-.

2.2 In accordance therewith, the draft assessment order was passed, wherein the A.O also examined the allowability of reimbursement of expenses made by the assessee to M/s. Satyam Computer Services Ltd without making any TDS therefrom. The assessee claimed that he has reimbursed expenses towards salary to its associated enterprises without any markup and therefore no deduction of tax at source u/s 194J of the Act was required. However, the A.O observed that the services rendered by M/s Satyam Computer Services Ltd, are in the nature of 'fees for technical services' and therefore, the assessee was required to make TDS and for failure of the assessee to have made TDS, the A.O proposed the disallowance u/s 40(a)(ia) of the Act. Against the draft assessment order, the assessee preferred its objections to the DRP, which confirmed the draft assessment order, but in respect rate of interest on receivables, the DRP held that it should be at the interest rates on short term deposits and not the lending rate of the SBI. Therefore, the rate of

interest was reduced to the applicable rates for the relevant period as mentioned in page 4 of its orders after granting credit period of 90 days.

2.3 As regards Sec. 40(a)(ia) disallowance, the assessee had submitted that though the assessee did not make TDS, the recipient has offered the income to tax in its hands and therefore the proviso to Sec. 40(a)(ia) of the Act would apply and no disallowance u/s 40(a)(ia) of the Act should be made. The DRP called for a remand report from the A.O. The A.O submitted that the proviso to Sec. 40(a)(ia) of the Act would apply only prospectively from the A.Y 2013-14 and hence was not applicable for the A.Y 2012-13. Taking the same into consideration, the DRP rejected the objections of the assessee. In accordance with the DRP directions, the A.O passed the final assessment order, against which, the assessee is in appeal before us by raising the following grounds of appeal:

“1. The order of the Ld. A.O is erroneous in law and on facts of the case.

Disallowance u/s 40(a)(ia)

2. The A.O / DRP erred in making disallowance of Rs. 10,18,50,289/- for the reimbursement of salary and other cost under the erroneous presumption that such an amount is liable for tax deduction u/s 194J.

3. *The A.O / DRP erred, in not deciding that the amendment to Sec. 40(a)(ia) is retrospective and accordingly erred in sustaining disallowance irrespective of the fact that the recipient had offered the entire amount as income resulting in compliance of Sec. 201(1) as well as Sec. 40(a)(ia) by the appellant.*

Transfer pricing adjustment u/s 92CA(3)

4. *The Ld. A.O / TPO / DRP erred in making transfer pricing adjustment of Rs. 61,61,031/- for the unrealized interest on trade receivables from foreign associated enterprises.*

5. *The Ld. A.O / TPO / DRP ought to have appreciated that the trade receivables are resultant of international transactions which were already subjected to transfer pricing regulation and hence ought to have considered that secondary adjustment was not necessary.*

6. *The Ld. A.O / TPO/DRP erred in re- characterization of the trade receivable transaction to that a loan, when the terms of contract does not provide for such treatment.*

7. *The Ld. A.O / TPO / DRP ought to have considered that, when the assessee did not charge any interest on similar trade receivables from non-associated enterprises, adjustment is not warranted by applying comparable uncontrolled price method.*

8. *The Ld. A.O / TPO / DRP erred in apply Indian Banks' fixed deposit rates, instead of LIBOR as the transaction is with a party outside India.*

2.4 As far as ground of appeal No. 2 is concerned, the Ld. Counsel for the assessee explained that the assessee had taken the assistance of the employees of the parent company, Tech Mahindra, who were already working in the respective countries to discharge its obligations outside India and therefore Tech Mahindra which was making payments of salaries to such employees had deducted tax at source from such payments of salaries and were

reimbursed by the assessee. It was submitted that there was no markup on the salaries paid to Tech Mahindra and therefore the deduction of tax at source was not required.

2.5 The Ld. DR, on the other hand, supported the orders of the authorities below and submitted that the agreement was between the assessee and the foreign company and the services of employees of Tech Mahindra were utilized by the assessee for discharging its obligations under the agreement. He, therefore, submitted that it is clear that Tech Mahindra has rendered technical services to the assessee and the payments made to Tech Mahindra ought to have suffered TDS u/s 194J of the Act.

2.6 After hearing both the parties, we find that the payments are made for the services rendered by employees of Tech Mahindra to the assessee and therefore it is clear that the technical services have been rendered to the assessee by Tech Mahindra, the assessee's parent company and also a resident company. Therefore, the payment made to the Tech Mahindra has to be made only after making TDS. The alternative argument of the assessee, in ground of appeal No. 3 is that the recipient has offered the income to tax in its hands. We find that the A.O and the

DRP have not accepted the same on the ground that the proviso to Sec. 40(a)(ia) of the Act is applicable prospectively and is not applicable to the year before us. The Ld. Counsel for the assessee has relied upon the decision of the Hon'ble Delhi High Court in the case of Ansal Land Mark Township (2014) 61 taxmann.com 45 (Delhi), wherein the said proviso to Sec. 40(a)(ia) of the Act has been held to be curative in nature and therefore applicable retrospectively. The Coordinate Benches of the Tribunal, have been following the said judgment to grant relief in various cases. Therefore, we hold that in the case before us also, if the recipient has offered the receipt as its income, then the disallowance u/s 40(a)(ia) of the Act cannot be made. The assessee has filed the relevant details before the DRP and the DRP has called for a remand report, wherein the A.O has supported the disallowance on the ground that the proviso to Sec. 40(a)(ia) of the Act is applicable prospectively. He further commented that certain part of the expenditure is not allowable and the DRP confirmed the order of the A.O only on the ground that the proviso is applicable prospectively. Thus, we find that the A.O has already considered evidence filed by the

assessee but has not given any finding as to whether the recipient has offered the said income to tax. Therefore, we deem it fit and proper to remand the issue to the file of the A.O with a direction to the assessee to file the relevant evidence before the A.O and the A.O shall then verify if the recipient had paid taxes on such sum and if it is found to be paid then no disallowance u/s 40(a)(ia) of the Act shall be made in the hands of the assessee. Thus, the ground of appeal No. 2 is dismissed and Ground of appeal No. 3 is treated as allowed for statistical purposes.

3. As regards the transfer pricing adjustment, the Ld. Counsel for the assessee submitted that the assessee has not charged interest on trade receivables either from the associate enterprises or from the non-associate enterprises and therefore the said transaction should not be considered as an international transaction and no interest should be levied thereon. Without prejudice to the above, he submitted that the CIT(A) for the A.Y 2013-14 has considered the issue and has levied the interest @ LIBOR plus 200 base points, and therefore the said rate should be applied for this assessment year also.

3.1 The Ld. DR, on the other hand, supported the orders of the authorities below and placed reliance upon the decision of the Hon'ble Delhi High Court in the case of McKinsey Knowledge Centre (P.) Ltd., [2018] 96 taxmann.com 237 (Delhi Trib), wherein the Hon'ble High Court has held that even prior to the amendment to Sec. 92B by Finance Act 2012, if there is any delay in receipt of the trading debt arising from sale of goods or services rendered in course of carrying on business, the assessee is liable to be visited with transfer pricing adjustment on account of interest income short charged / undercharged. He also submitted that the SLP filed by McKinsey Knowledge Centre (P) Ltd., has also been dismissed by the Hon'ble Supreme Court and therefore the decision of the Hon'ble High Court has become final.

3.2 Having regard to the rival contentions and the material available on record, we find that the decision of the Hon'ble High Court in the case of Mckinsey Knowledge Centre (P.) Ltd., (supra) has subsequently been recalled vide order dated 16.04.2019 by the Hon'ble Delhi High Court in review petition No. 359/2018 in ITA No. 526 of 2017 and 360 of 2018 and 461 of 2017 for fresh

consideration and therefore the said decision cannot be applied in toto to the facts of the case before us. However, after the amendment of Sec. 92B of the Act, interest on receivables is an international transaction. Further, except commenting that there is an inordinate delay in receipt of the amounts from its AE, the TPO has not brought out any of the details such as the agreed period of credit, the period of delay and also the industry average period of credit, before bringing the interest on receivables to tax. Therefore, we deem it fit and proper to remand the issue to the A.O / TPO to conduct proper transfer pricing study and re-compute the transfer pricing adjustment and also the rate of interest to be applied in accordance with the judicial precedents on the issue. In the result, the assessee's appeal is partly allowed for statistical purposes.

ITA No. 864/Hyd/2018, A.Y 2013-14

4. This appeal is against the order the CIT(A)-11, Hyderabad dated 18.04.2018. The only issue involved in this appeal is the transaction of interest on receivables. Since, the issue is the same as in the A.Y 2012-13 and for the detailed reasons given above in para No.3, we are

remitting this issue also to the file of the TPO to follow the direction given in para No. 3 above. Accordingly, ground raised by the assessee is allowed for statistical purposes.

4.1 In the result the assessee appeal is allowed for statistical purposes.

ITA No. 865/Hyd/2018, A.Y 2014-15

5. This appeal is against the order the CIT(A)-11, Hyderabad dated 18.04.2018 issue is common as for the A.Y 2013-14 that is interest on receivables. In this appeal the assessee has also raised the following additional ground of appeal:-

“Notwithstanding to the other grounds of appeal, already raised and on the facts and circumstances of the case, the Ld. A.O erred in making addition of Rs. 32,20,765 towards interest receivable from foreign associates under normal provisions of the IT Act, 1961.

5.1 The Ld. Counsel for the assessee submitted that during relevant assessment year, though the assessee has filed necessary forms in respect of the international transactions, the A.O has not referred the matter to the TPO for determination of the arm's length price but has

made the addition himself, which is against the provisions of the Act. To this objection, the Ld. DR submitted that the CBDT had issued an instruction No. 15/2015 dated 16.10.2015 whereby there is no requirement of selecting the transfer pricing cases for scrutiny on the basis of the value of the international transaction and consequently, there was no requirement of referring an international transaction to the TPO for determination of its arm's length price. Therefore, according to him, the A.O could determine the arm's length price by himself and during the said period the issue was pending before the A.O after issuance of notices u/s 142 of the Act. The Ld. Counsel for the assessee, however, submitted that this notification has been superseded by instruction No. 03 of 2016 dated 10.03.2016 and therefore the A.O ought to have referred the matter to the TPO since the assessment order was passed on 30.12.2016 i.e nearly after nine months of issuance of notification. Therefore, according to the Ld. Counsel for the assessee the assessment order itself is null and void. Even on the merits of the issue, he reiterated the arguments made for the earlier assessment years.

5.2 Having regard to the rival contentions and the material on record, we find that prior to the instruction of 15/2015, the A.O was required to refer the matter to the TPO if the value of the international transaction crossed a quantum. Vide the instruction 15 of 2015, the A.O was directed to complete the assessment by himself without making any reference to the TPO. This notification has been replaced by the instruction No. 03 of 2016, whereby the A.O has to refer the matter to the TPO for determination of the ALP. We find that the notification 3 of 2016 has been issued on 10.03.2016 i.e much prior to the completion of the assessment proceedings and therefore we agree with the contentions of the Ld. Counsel of the assessee that the A.O ought to have referred the matter to the file of the TPO for determination of the arm's length price. However, this is only a procedural irregularity which can be cured. Therefore, we deem it fit and proper to remand this issue to the file of the A.O with a direction to refer the issue to the file of the TPO for de-novo transfer study as directed by us in the earlier assessment years.

5.3 In the result, the assessee's appeal for the A.Y 2014-15 is also partly allowed for statistical purposes.

6. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Pronounced in the open court on 1st July, 2019

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(P. MADHAVI DEVI)
JUDICIAL MEMBER

Hyderabad, Dated: 1st July, 2019

KRK

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- 2) *ACIT, Central Circle – 3(2) Hyderabad.*
- 3) *TPO-2, Hyderabad.*
- 4) *DRP-1, Bengaluru.*
- 5) *The Departmental Representative, I.T.A.T., Hyderabad.*
- 6) *Guard File.*