

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

**BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.6935/Del/2017
Assessment Year: 2014-15

M/s. Ernst & Young Ltd., India Branch Office, Office No. 7, 1 st Floor, Atma Ram Mansion, Scindia House, KG Marg, Connaught Place, New Delhi	Vs.	ACIT (International Taxation), Circle-1(2)(2), New Delhi
PAN :AABCE9897M		
(Appellant)		(Respondent)

Appellant by	Shri Abhimanyu Jhamba, Adv & Ms. Hemlata Ranga, Adv.
Respondent by	Ms. Ashima Neb, Sr.DR

Date of hearing	24.07.2019
Date of pronouncement	03.09.2019

ORDER

PER O.P. KANT, A.M.:

This appeal by the assessee is directed against order dated 30/10/2017 passed by the Assistant Commissioner of Income Tax, Circle-1(2)(2), International Taxation, New Delhi [in short 'the Ld. Assessing Officer'] for assessment year 2014-15, in pursuant to the direction of Ld. Dispute Resolution Panel (DRP). The grounds raised in appeal are reproduced as under:

1. *Based on the facts and circumstances of the case, the Hon'ble Dispute Resolution Panel -I, New Delhi ("Hon'ble DRP") and the learned Assessing Officer ('Ld. AO') have erred in law and in facts in*

computing the total income of the appellant for the year at Rs. 42,445,767/- as against returned income of Rs. 39,807.820/-.

- 2. Based on the facts and circumstances of the case, the Hon'ble DRP has erred on facts and in law in failing to appreciate that the General & Administrative expenses incurred outside India by the Head Office of the Appellant and not charged to the Branch are not in the nature of 'reimbursement of expenses' and cannot be to be considered as a part of 'cost base' while applying mark-up of 18% on costs incurred in India, and consequently in making an addition of Rs. 542.798/- to the returned income.*
- 3. Based on the facts and circumstances of the case, the Hon'ble DRP has also erred on facts and in law in the denying allowance claimed under section 44C of the Act amounting to Rs. 2,095,149/- on the incorrect averment of the Ld. AO that since the appellant is a cost-plus entity, its revenue is directly linked to underlying costs, and, while doing so. The Hon'ble DRP has failed to appreciate the fact that the general & administrative expenses incurred outside India by the head office of the Appellant and are not charged or debited by the BO in India.*
- 4. Based on the facts and circumstances of the case, the Hon'ble DRP has erred on the facts in failing to appreciate that the appellant had duly filed Form 3CEB on 26 November 2014 electronically and also submitted the same before the Ld. AO during the course of hearing vide submission dated 13 October 2016.*
- 5. Based on the facts and circumstances of the case, the Ld. AO has erred in allowing credit for only Rs. 17,500,000/- for Advance Tax paid as against Rs. 26,000,000/- actually paid and duly reflected in Form 26AS.*
- 6. Based on the facts and circumstances of the case, the Ld. AO has erred in law in initiating penalty proceedings under section 271(1)(c) of the Act without appreciating the fact that the appellant has not concealed any income or disclosed any incorrect particulars during the proceedings.*

2. Briefly stated facts of the case are that the assessee is a branch office of company namely M/s Ernst and Young Limited, incorporated in United Kingdom (UK). The head office of the company (in short 'E & Y Ltd.') is located in United Kingdom. The branch office in India at New Delhi was established in April 2008 with the permission of the Reserve Bank of India to provide

professional services to its parent and other member firms of E & Y Global. For the year under consideration, the assessee i.e. branch office filed return of income, which was further revised on 27/11/2014 declaring total income of Rs.39,807,820/- under the normal provisions of the Income-tax Act, 1961 (in short 'the Act'). The assessee claimed itself to be a cost plus entity with margin of 18%. According to the agreement between the head office and the assessee, the assessee was entitled for 18% margin on the cost incurred for services rendered to head office as well as other group concerns.

2.1 The case of the assessee was selected for the scrutiny. In the course of assessment proceeding, the Assessing Officer observed expenses of Rs.30,15,545/- incurred by the head office outside India with respect to administrative matter of the Indian branch office. This expense was debited in the books of the head office and not in the books of the Indian Branch Office. The assessee restricted its claim for deduction/allowance of such expenses to the extent of limit prescribed under section 44C of the Act i.e. 5% of the adjusted total income, which was worked out to Rs.20,95,149/-. The Assessing Officer noticed claimed of deduction of Rs.20,95,149/- under section 44C of the Act i.e. deduction for expenses incurred by the head office, which were related to the branch office. The Assessing Officer further observed that being a cost plus entity, the assessee was also required to claim markup at the rate of 18% on the said expenses incurred by the head office, amounting to Rs.5,42,798/-.

2.2 The Assessing Officer asked as to why the assessment should not be completed following the basis of assessment year 2013-14. After considering submission of the assessee, the Ld.

Assessing Officer proposed disallowance of Rs.20,95,149/-under section 44C of the Act and addition of Rs.5,42,798/- as markup on expenses incurred by the head office, observing as under:

“6.2.5 It is an admitted fact that the assessee, is a ‘Cost Plus’ mark-up entity, which follows a ‘Mercantile method’ of accounting. Hence, the revenue that has to be examined from perspective of the income which accrues or arises in India. Since, the expenses incurred by the HO for the Indian BO are Rs 30,15,545/- and mark-up of 18% on Rs. 30,15,545/- which comes to Rs 5,42,798/- is the income which has also accrued to the Indian BO on the costs incurred by the HO in United Kingdom. Accordingly, it is proposed to enhance the taxable income of the assessee by Rs. 5,42,798/- for the year under consideration.

6.2.6 As the assessee, is a ‘Cost Plus’ mark-up entity, therefore, it is not eligible for a deduction u/s 44C of the Act, since, the revenues in such cases are a directly linked to the underlying costs. Section 44C of the Act, has been inserted to lighten the burden from the assessee's shoulders with regard to the justification of the ‘head office expenses’ and its underlying documentation. Hence, a deduction is allowed upto a specified limit to an assessee, who is doing business in normal course and not as a ‘Cost Plus’ entity. Therefore, it is not entitled to deduction of Rs 20,95,149/- u/s 44C of the Act as claimed in the return of income already filed.”

2.3 The assessee filed objection before the Ld. DRP, however, could not succeed. Aggrieved, the assessee is before the Tribunal raising the grounds as reproduced above.

3. Before us, the Ld. counsel of the assessee submitted that Assessing Officer has passed the present assessment order relying on the order for the assessment year 2013-14. He further submitted that the Tribunal in ITA No. 6561 & 6562/12/2016 for assessment years 2012-13 and 2013-14 respectively has decided identical questions and allowed the appeals of the assessee. He accordingly requested that issue in dispute being covered in the favour of the assessee, the present appeal might be allowed.

4. On the contrary, the learned DR relied on the order of the lower authorities and submitted that the assessee has not debited

the head office expenses related to it in its books of account and, therefore, it is not entitled for deduction under section 44C of the Act. Regarding markup of 18% on the head office expenses, also the DR submitted that as per the agreement, the assessee was required to offer income at 18% markup on the cost incurred and the head office expenses also being cost of the assessee, the markup on the said cost also accrued to the assessee. He submitted that due to failure on the part of the assessee to offer such income, the Assessing Officer was justified in making the said addition.

5. We have heard the rival submissions of the parties and perused the relevant material on record, including the assessment orders for assessment years 2012-13 and 2013-14 and the order of the Tribunal in ITA Nos. 6561 & 6562/Del/2016 for assessment years 2012-13 and 2013-14. We find that the issue in dispute in the year under consideration has been dealt verbatim as was dealt in assessment year 2012-13 and 2013-14. The finding given in assessment year 2013-14 is reproduced for ready reference:

“6.2.5 It is an admitted fact that the assessee, is a ‘Cost Plus’ mark-up entity which follows a ‘Mercantile method’ of accounting. Hence, the revenue that has to be examined from perspective of the income which accrues or arises in India Since, the expenses incurred by the HO for the Indian BO are Rs 1,47,11,100/- and mark-up of 18% on Rs. 1,47,11,100/- which comes to Rs 26,47,998/- is the income which has also accrued to the Indian BO on the costs incurred by the HO in United Kingdom. Accordingly, it is proposed to enhance the taxable income of the assessee by Rs. 26,47,998/- for the year under consideration.

6.2.6 As the assessee, is a ‘Cost Plus’ mark-up entity, therefore, it is not eligible for a deduction u/s 44C of the Act, since, the revenues in such cases are a directly linked to the underlying costs. Section 44C of the Act, has been inserted to lighten the burden from the assessee’s shoulders with regard to the justification of the ‘head

office expenses' and its underlying documentation. Hence, a deduction is allowed upto a specified limit to an assessee, who is doing business in normal course and not as a 'Cost Plus' entity. Therefore, it is not entitled to deduction of Rs 25,41,922/- u/s 44C of the Act as claimed in the return of income already filed."

5.1 The Tribunal (supra) in assessment year 2012-13 has adjudicated both the issue as under:

"14. We have considered the rival arguments made by both the sides and perused the material available on record. We find the assessee in the instant case has claimed an amount of Rs.24,87,617/- u/s 44C of the I.T. Act on account of Head Office Expenditure. We find the Assessing Officer noting that the assessee has not claimed such expenditure in the Profit & Loss Account of the Indian Branch Officer, disallowed the same. The Assessing Officer further made addition of Rs.21,39,012/- being the undisclosed markup on the cost incurred by the Head Office in UK. It is the submission of the ld. counsel for the assessee that the assessee claimed the deduction u/s 44C which is in accordance with law and non-claim of the same in the Profit & Loss Account is not relevant. Further, it is also his submission that no income has accrued to the assessee on account of Head Office and income, if any, that accrues to the Head Office has to be accounted for by the Head Office only. Therefore, the Assessing Officer was not justified in making the addition on account of undisclosed markup on the cost incurred by the Head Officer in UK.

15. We find some force in the above arguments advanced by the Id. counsel for the assessee.

16. So far as addition of Rs.21,39,012/- made by the Assessing Officer on account of undisclosed markup on the cost incurred by the Head Office in UK is concerned, we are of the opinion that the income, if any that accrues on account of expenditure incurred by the Head Office, it will be the income of the Head Office and not the Indian Branch Office in view of the decision of the Delhi Bench of the Tribunal in the case of Education Australia Limited (supra), the finding of which has already been reproduced at para 9 of this order.

17. So far as disallowance of Rs.24,86,617/- claimed by the assessee on account of section 44C is concerned, we are of the opinion that the Assessing Officer is not justified in making the addition. No doubt, the assessee has not debited the said expenditure in the Profit & Loss Account. However, it is an admitted fact that the assessee has claimed the expenditure in the

computation statement. The Mumbai Bench of the Tribunal in the case of British Bank of Middle East (supra) under similar circumstances has held that non-debiting of the expenditure in the books of account of India operations is not relevant for allowability of the same in the light of the law laid down by the Hon'ble Supreme Court in the case of Kedarnalh Jute Mills Co. Ltd. (supra). It has been held that as long as the expenditure is really incurred and is otherwise deductible, the deduction cannot be declined on the ground that it has not been debited in the books of account. Since in the instant case there is no dispute to the fact that the head office has incurred the expenditure for the Branch office, the genuineness of which has not been doubted and since the assessee has claimed the deduction u/s 44C of the I.T. Act in the computation statement, therefore, in view of the decision of the Mumbai Bench of the Tribunal cited (supra), we hold that the Assessing Officer is not justified in disallowing the claim merely for not debiting the same in the Profit & Loss Account. In this view of the matter, we set-aside the order of the Assessing Officer/DRP/TPO and direct the Assessing Officer to allow the claim of expenditure u/s 44C and delete the addition on account of undisclosed mark up on the costs incurred by the HO in UK. The grounds raised by the assessee are accordingly allowed.”

5.2 In assessment year 2013-14, also the finding of assessment year 2012-13 has been followed.

5.3 In view of the identical questions raised in grounds No. 1 to 4 before us, respectfully following the finding of the Tribunal (supra), grounds of the assessee are allowed.

6. In ground No. 5, the assessee has raised the issue of credit for advance tax of Rs.26,000,000/- as against credit allowed of Rs.17,500,000/-. In our opinion, this is the issue of verification of the advance- tax payment made by the assessee. Accordingly, we remit this issue to the file of the Assessing Officer with the direction to the assessee to produce all the evidence in support of the advance tax paid in its possession for verification by the Assessing Officer with the information available in the database of the Income Tax Department and allow the credit in accordance

with law. The ground of the appeal is accordingly allowed for statistical purposes.

7. The ground No. 6 of the appeal being premature at this stage, it is dismissed as infructuous.

8. In the result, the appeal of the assessee is allowed partly for statistical purposes.

Order is pronounced in the open court on 3rd September, 2019.

Sd/-
[SUDHANSHU SRIVASTAVA]
JUDICIAL MEMBER

Sd/-
[O.P. KANT]
ACCOUNTANT MEMBER

Dated: 3rd September, 2019.

RK/-[d.t.d.s]

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi