IN THE INCOME TAX APPELLATE TRIBUNAL
"J" Bench, Mumbai

Before Shri Rajesh Kumar, Accountant Member
and Shri Ravish Sood, Judicial Member

ITA No.1842/Mum/2017
(Assessment Year: 2012-13)

Reach Data Services India Private Limited, Unit No. 4, 3rd Floor, B-wing, Times Square, Andheri- Kurla Road,Andher (East), Mumbai – 400059	Vs.	Office of the Income Tax Officer-13(3)(1) Room No. 227, 2nd Floor, Aayakar Bhavan, Mumbai-20
PAN – AABCT3343D		
(Appellant)		**(Respondent)**

Appellant by: Shri Percy Pardiwala, A.R
Respondent by: Shri Uodal Raj Singh, D.R

Date of Hearing: 03.10.2019
Date of Pronouncement: 16.10.2019

O R D E R

PER RAVISH SOOD, JM

The present appeal filed by the assessee is directed against the order passed by the CIT(A)-21, Mumbai, dated 23.12.2016, which in turn arises from the order passed by the A.O under Sec. 143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 30.03.2015 for A.Y. 2012-13. The assessee assailing the impugned order has raised before us the following grounds of appeal:

"Each of the grounds of appeal are without prejudice to and independent of one another

(a) On the facts and circumstances of the case and in law, the Hon'ble Commissioner of Income-tax (Appeals)-21 ['CIT(A)'] erred in holding that notional interest on the outstanding receivables from Reach Network India Private Limited ('RNIPL'), a domestic group company, is a transaction for the purposes of Chapter X of the Income-tax Act, 1961 (the Act').

(b) On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in holding that the transaction between the Appellant and RNIPL is a deemed international transaction within the meaning of section 92B(2) of the Act.

(c) On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in holding that the Appellant and RNIPL are associated enterprises within the meaning of section 92A of the Act.

(d) On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the adjustment under section 92C(3) of the Act despite the fact that the Assessing Officer had not made the adjustment on the basis of any method under section 92C(1) of the Act.

(e) On the facts and circumstances of the case and in law, the Hon'ble CIT(A) erred in confirming the transfer pricing adjustment of Rs.1,86,17,406/- on account of notional interest on the outstanding receivables from the domestic group company, RNIPL.

The Appellant craves leave to add, alter, modify and withdraw all or any of the above grounds of appeal at or before the time of hearing of the appeal.

For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided."

2. Briefly stated, the assessee company which is engaged in the business of providing network and support services to its Associate Enterprise (for short 'AE') i.e M/s Reach Network India Pvt. Ltd., had e-filed its return of income declaring a loss of (-) Rs.3,07,233/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec.143(2).

3. In the course of assessment proceedings, it was observed by the A.O that the assessee company had shown trade receivable of Rs.20,68,60,069/- from its related party i.e, M/s Reach Network India Pvt. Ltd. In the backdrop of the aforesaid fact, the A.O called upon the assessee to explain as to why a transfer pricing adjustment under Sec. 92 may not be carried out in respect of the interest income receivable from M/s Reach Network India Pvt. Ltd. In reply, it was inter alia submitted by the assessee, that as the transactions were between the two domestic related parties viz. (i) M/s Reach Data Services India Pvt. Ltd. (the assessee); and (ii) M/s Reach Network Pvt. Ltd., therefore, the same did not qualify as an international transaction, failing which no adjustment on the said count was called for in its hands. However, the explanation of the assessee did not find favour with the A.O. It was observed by the A.O that M/s Reach Holdings, Mauritius was a 100% shareholder in the assessee company and also 99% shareholder in M/s Reach Network India Pvt. Ltd. Also, it was observed by him that the aforesaid concerns had a common director viz. Shri Rana Sami Chocklingam. On the basis of the aforesaid facts, the A.O was of the view that the transactions of the assessee company and M/s Reach Network India Pvt. Ltd. were determined by their parent holding company i.e M/s Reach Holdings, Mauritius. Accordingly, the A.O was of the view that M/s Reach Network India Pvt. Ltd. was an Associate Enterprise (for short "AE") within the meaning of Sec.92A(2)(a) of the Act. As the assessee company had entered into a service agreement with M/s Reach

Network Pvt. Ltd on 07.05.2004 for providing network services, therefore, the A.O concluded that the transaction between M/s Reach Network India Pvt. Ltd, an AE and the assessee company were in the nature of a 'deemed' international transaction within the meaning of Sec. 92B(2) of the Act. On the basis of his aforesaid deliberations, the A.O was of the view that the non-charging of interest by the assessee company on the amount of Rs.20,68,60,069/- that was due from M/s Reach Network India Pvt Ltd. since 31.03.2011, could safely be held to be a transaction that had not been carried out at arm's length price. It was observed by the A.O, that the assessee could have beneficially earned an income of Rs.1,86,17,406/- i.e @ 9% per annum (interest rate prevailing on bank deposits in India) on the aforesaid amount so receivable from its AE. Accordingly, the A.O carried out an adjustment of Rs.1,86,17,406/- under Sec.92C of the Act and assessed the income of the assessee company under the normal provisions at Rs.3,59,58,610/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). In the course of the appellate proceedings, it was inter alia submitted by the assessee that as the transaction with its related party i.e Reach Network India Pvt. Ltd was a transaction between two domestic related parties, therefore, there was no question of determination of arm's length price in respect of the same. However, the CIT(A) was not persuaded to subscribe to the contention advanced by the assessee and upheld the view taken by the A.O.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal took us through the facts of the case. It was submitted by the ld. A.R, that as the transaction entered into between the two domestic related parties viz. M/s Reach Data Services India Pvt. ltd. (the assessee) and M/s Reach Network India Pvt. ltd. did not qualify as an international transaction, therefore, the authorities below had gravely erred in law in making an adjustment of Rs,1,86,17,406/- under Sec.92C of the Act. In order to drive home his aforesaid contention that a transaction entered into between two domestic related parties cannot be construed as an international transaction, the ld. A.R took us through the definition of 'international transaction'as envisaged in Sec.92B of the Act. Also, it was submitted by him, that as the "Specified domestic transactions" u/s 92BA of the Act, had been made available on the statute, vide the Finance Act, 2012 w.e.f 01.04.2013, therefore, the same were

not applicable to the case of the assessee for the year under consideration, i.e A.Y. 2012-13. In support of his aforesaid contention the ld. A.R had relied on the order of the ITAT, Hyderabad Bench "B" Hyderabad in the case of M/s Astrix Laboratories Ltd, Hyderabad Vs. ACIT, Circle-16(2), Hyd (ITA No. No.2181/Hyd/2011, dated 29.01.2016).

6. Per contra, the ld. Departmental Representative (for short 'D.R') relied on the order passed by the CIT(A).

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, and also the judicial pronouncements relied upon by them to buttress their respective contentions. Our indulgence in the present appeal has been sought by the assessee, for adjudicating, as to whether the provisions of Chapter X of the Act would be applicable in the case of the present assessee, or not. Before adverting to the adjudication of the issue under consideration, we feel that it would be relevant to cull out the definition of an international transaction as is envisaged in Sec. 92B of the Act, which reads as under:

> **"Meaning of international transaction.**
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> **92B. (1)** For the purposes of this section and sections 92, 92C, 92D and 92E,
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> "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.
>
> **(2)** A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1) be [deemed to be an international transaction] entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise "[where the enterprise or the associated enterprise or both of them are non-residents irrespective of whether such other person is a non-resident or not].
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> [Explanation.—Forthe removal of doubts, it is hereby clarified that—
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> (i) the expression "international transaction" shall include—
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> (a) the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing;
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> (b) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licences, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;

(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;

(d) provision of services, including provision of market research, market development, marketing management, administration, technical service, repairs, design, consultation, agency, scientific research, legal or accounting service;

(e) a transaction of business restructuring or reorganisation, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date;

(ii) the expression "intangible property" shall include—

(a) marketing related intangible assets, such as, trademarks, trade names, brand names, logos;

(b) technology related intangible assets, such as, process patents, patent applications, technical documentation such as laboratory notebooks, technical know-how;

(c) artistic related intangible assets, such as, literary works and copyrights, musical compositions, copyrights, maps, engravings;

(d) data processing related intangible assets, such as, proprietary computer software, software copyrights, automated databases, and integrated circuit masks and masters;

(e) engineering related intangible assets, such as, industrial design, product patents, trade secrets, engineering drawing and schematics, blueprints, proprietary documentation;

(f) customer related intangible assets, such as, customer lists, customer contracts, customer relationship, open purchase orders;

(g) contract related intangible assets, such as, favourable supplier, contracts, licence agreements, franchise agreements, non-compete agreements;

(h) human capital related intangible assets, such as, trained and organised work force, employment agreements, union contracts;

(i) location related intangible assets, such as, leasehold interest, mineral exploitation rights, easements, air rights, water rights;

(j) goodwill related intangible assets, such as, institutional goodwill, professional practice goodwill, personal goodwill of professional, celebrity goodwill, general business going concern value;

(k) methods, programmes, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data;

(l) any other similar item that derives its value from its intellectual content rather than its physical attributes.]"

On a perusal of the aforesaid, it can safely be gathered that for a transaction to be characterised as an international transaction, the same has to be viz. (i) a specified transaction between two or more associated enterprises, either or both of whom are non-resident, shall be an international transaction within the meaning of sub-section (1) of Sec. 92B of the Act; or (ii) a transaction entered into by an enterprise with a person other than an associated enterprise, shall for the purpose of sub-section (1) of Sec. 92B of the Act, be deemed to be a transaction entered into between two associated enterprises, if there existed a prior agreement in relation to the relevant transaction between such other person and the associated enterprise or the terms of the relevant transactions are determined in substance between the such other person and the associated enterprise. Admittedly, as neither the assessee or its related party i.e M/s Reach Network India Pvt. Ltd. is a non-resident, therefore, the transaction entered into between

them would not fall within the basic meaning of an "international transaction" as envisaged in sub-section (1) of Sec. 92B. Now, adverting to the extended meaning of an international transaction, as is envisaged in sub-section (2) of Sec. 92B, we find, that the same presupposes a transaction entered into by an enterprise with a person other than an associated enterprise. In the case before us, as the transaction under consideration i.e charging of interest on the amount of Rs.20,68,60,069/- by the assessee from its AE i.e M/s Reach Network India Pvt. Ltd, is clearly a transaction between two AEs, therefore, the prerequisite condition contemplated in sub-section (2) of Sec.92B i.e the transaction should have been entered into by an enterprise with a person other than an associated enterprise is not satisfied. Accordingly, in the backdrop of our aforesaid observations, we are of the considered view that the transaction between the assessee and M/s Reach Network India Pvt.ltd., being a transaction between two domestic AEs, cannot be brought within the realm of the definition of an international transaction as envisaged in Sec.92B of the Act. As regards the observations of the lower authorities, that as M/s Reach Holdings, Mauritiusi.ethe parent company is holding 100% shareholdingin the assessee company and also 99% shareholdingin M/s Reach Network India Pvt. ltd, therefore, the same would suffice for concluding that the aforesaid two enterprises i.e M/s Reach data Services India Pvt. Ltd. (the assessee) and M/s Reach Network India Pvt. ltd. are to be deemed to be AEs during the year under consideration, to the said extent, we are persuaded to subscribe to the view of the lower authorities. Although, we are in agreement with the observations of the lower authorities that the assessee and M/s Reach Network India Pvt. ltd. are AEs under Sec. 92A(2) of the Act, however, merely on the said count a transaction inter se cannot be held to be an international transaction. As the requisite conditions for characterising a transaction as an "international transaction" within the meaning of Sec. 92B is not satisfied in the case before us, therefore, we have no hesitation in concluding that *san* existence of an international transaction, the A.O could not have made an adjustment of Rs.1,86,17,406/- under Sec.92C of the Act. Our aforesaid view is fortified by the order of the coordinate bench of the Tribunal in the case of **M/s Astrix Laboratories Ltd. Vs. ACIT (2015) 44 CCH 113 (Hyd.)**. In the aforesaid case, the Tribunal relying on its earlier order passed while disposing off the appeal of the assessee for A.Y. 2006-07, vide its order in ITA No.840/Hyd/2012, dated 16.01.2015, had observed, that after considering the provisions of Sec. 92B of the Act, for

coming within the expression 'international transaction' at least one of the parties should be a non-resident. The Tribunal while concluding as hereinabove, had observed as under:

> "5. We have heard the arguments of both the sides and also perused the relevant material on record. Although the learned D.R. has strongly relied on the order of the TPO in support of the Revenue's case that the relevant transactions between the assessee company and M/s. Mylan **Laboratories** Ltd., involving payment of management fees are in the nature of deemed international transactions, it is observed that a similar issue in assessee's own case for A.Y. 2009-2010 has been decided by the Tribunal in favour of the assessee vide its order dated 25.03.2015 passed in ITA.No.198/Hyd/2014 vide paragraph No.4 which reads as under :
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> > "4. Coming to the Revenue's appeal, as seen from the orders of the authorities, the TPO vide his show cause notice dated 22.10.2012 has stated that the transactions entered into by **Astrix** and Matrix are deemed international transactions and sought to examine whether the same have been entered into atarms length price. Since the transactions between Matrix and **Astrix** both being resident companies in India do not fall within the definition of international transactions so as to necessitate the computation of arms length price under the T.P. provisions of the Act, DRP accepted the assessee's objections. DRP also noted that the transactions between the Matrix and assessee does not in any way shift any profits out of India, since both the entities are taxable entities in India and the question of applying the T.P. provisions does not arise. The DRP placed reliance in the case of IJM (India) Infrastructure Ltd., vs. ACIT, Circle 2(1), Hyderabad ITA.No.1814/Hyd/2012 dated 22.08.2013 and in the case of M/s. Swarnandhra IJMII Integrated Township Development P. Ltd., vs. DCIT, Circle 3(3), Hyderabad in ITA.No.2072/ Hyd/2011. Since the TPO does not have any jurisdiction to examine the domestic transactions in the impugned assessment year, the DRP has rightly held that stand of the TPO fails. Since the decision of the DRP is in tune with the pronouncements of the ITAT on similar issues that domestic transactions cannot be examined under T.P. provisions for the impugned assessment year, we have no hesitation in upholding the order of the DRP."
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> 5.1. As the issue involved in the year under consideration as well as all the material facts relevant thereto are similar to that of A.Y. 2009-2010, we respectfully follow the decision of the Coordinate Bench of this Tribunal for A.Y. 2009-2010 and uphold the order of the DRP directing the A.O. not to make any addition on account of T.P. adjustment in respect of the transactions of the assessee company with M/s. Mylan Laboratories Ltd., involving payment of management fees. The appeal of the Revenue is accordingly dismissed."

On the basis of our aforesaid observations, we are of the considered view that as the assessee neither falls within the sweep of the meaning of an international transaction as envisaged in sub-section (1) of Sec. 92B, nor is covered by the extended meaning of a 'deemed' international transaction as provided in sub-section (2) of Sec. 92B, therefore, the adjustment of Rs.1,86,17,406/- made by the A.O under Sec. 92C cannot be principally sustained, and is liable to be vacated. Before parting, we may also observe, that as the provisions pertaining to transfer pricing of specified domestic transactions as envisaged in Sec.92BA of the Act, had been made available on the statute vide the Finance Act, 2012 w.e.f 01.04.2013 i.e from A.Y. 2013-14, therefore, the same would not be applicable to the case of the assessee before us for the year

under consideration i.e A.Y. 2012-13. Be that as it may, we may herein observe that it is not even the case of the revenue that the A.O had made the aforesaid T.P Adjustment under Sec.92BA of the Act. On the basis of our aforesaid observations, we delete the addition of Rs.1,86,17,406/- made by the A.O under Sec.92C of the Act. Accordingly, the order of the CIT(A) is set aside.

8. The appeal filed by the assessee is allowed in terms of our aforesaid observations.

Order pronounced in the open court on 16.10.2019

Sd/-	Sd/-
(Rajesh Kumar)	(Ravish Sood)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 16.10.2019
PS. Rohit

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

सत्यापितप्रति //True Copy//

आदेशानुसार/ BY ORDER,
उप/सहायकपंजीकार (Dy./Asstt. Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai**