

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

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

IT(TP)A No.697/Bang/2017
Assessment year: 2012-13

M/s. Incap Contract Manufacturing Services Pvt. Ltd., Sufiya Elite, 3 rd Floor, No.18, Cunningham Road, Bangalore – 560 052. PAN: AABCI 6651H	Vs.	The Assistant Commissioner of Income Tax, Circle 3(1)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri K.R. Vasudevan, Advocate
Respondent by	:	Shri Pradeep Kumar, CIT(DR)(ITAT) Bengaluru.

Date of hearing	:	04.12.2019
Date of Pronouncement	:	30.12.2019

ORDER

Per N.V. Vasudevan, Vice President

This is an appeal by the Assessee against the order of assessment dated 31.1.2017 passed by the ACIT, Circle 3(1)(1), Bangalore u/s. 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 [the Act] relating to assessment year 2012-13.

2. Ground Nos. 1 to 3 raised by the assessee reads as follows:-

“Transfer Pricing

The grounds mentioned hereinafter are without prejudice to one another.

1. The learned Assessing Officer (' learned AO'), learned Transfer Pricing Officer ('learned TPO') and the Honourable Dispute Resolution Panel ('Hon'ble DRP') grossly erred in determining an adjustment of INR 1,45,40,935/- with respect to the international transaction rendered by the taxpayer u/s 92CA of the Income-tax Act, 1961.
 2. The learned AO/ learned TPO/ 'Hon'ble DRP' erred in concluding that the Arm' s Length Price (' ALP') with respect to the payments made towards IT & Management Services segment received by the Appellant from its Associated Enterprise (' AE') to be ' Nil ' .
 3. The learned AO/ learned TPO/ 'Hon'ble DRP' erred in not considering the additional evidences to substantiate the receipt of services and corresponding benefit received through the IT & Management Services ground.”
3. The assessee is a company engaged in the business of manufacturing of UPS, Invertors, PCBA Assembly, electronic equipments, sub-systems, etc. The assessee made payment of Rs.14,50,40,935 to an Associated Enterprise (AE) [non-resident]. The payment was claimed to have been made for providing IT and Management Services by AE to the assessee. Since the payment was made to an AE, it was an international transaction and arm's length price (ALP) of the payment in question had to be determined in view of the provisions of Section 92 of the Act. It was the claim of assessee that the AE provided IT support services like trouble shooting, perceived threats of data storage, assistance in additional software reporting structure, etc. The assessee enclosed email copies of the assistance provided by the AE, Incap Finland in resolving the various IT related issues.

4. The TPO was of the following view:-

“Only the copies of the emails of assistance requested by the taxpayer to the AE have been annexed to the submission. Assuming but not concluding that even if there is rendering of services, the taxpayer has not been able to prove the benefits of receipt of such services. The actual expenditure incurred by the AE in terms of man hours spent by its employees in attending to taxpayer's various necessities have not been submitted. There seems to be no basis for allocation of the expenditure of the taxpayer.”

5. According to the TPO, the assessee failed to prove rendering of actual services and further failed to justify the price charged by the AE and the benefit which the assessee received from services provided by the AE. The TPO accordingly came to the conclusion that the ALP of the transaction has to be regarded as NIL and the entire payment made to the AE was treated as an adjustment u/s. 92CA of the Act and added to the total income of the assessee.

6. Aggrieved by the action of the AO in making the addition of adjustment suggested by the TPO in the order u/s. 92CA of the Act, the assessee preferred objections before the DRP. In its objections, the assessee submitted that the Assessee received management services from its AE which included guidance on the overall operations of the company, providing training to the employees, meeting local vendors in identifying the suppliers and having discussion with the customers for supply of products. The cost relating to Travel expenses and Visa expenses of AE's employees who visited customer for business development of the Assessee were reimbursed by the Assessee to its AE at cost without any mark-up. It was further submitted that accounting related services provided by the AE to the Assessee was reimbursed by the Assessee to its AE at cost without any markup. It was also submitted that the Assessee was manufacturing electronic and electrical products like

printed circuit boards, power backups etc. The Assessee received support services including operational support by deputation of employees, IT support, technical assistance and support in business development by marketing the products manufactured by the Assessee, supervision in Human resource, finance, administrative matters from its AE in carrying out its operations.

7. The Assessee submitted that there was no mark-up charged by the AE and the entire IT and management charges were reimbursed at cost to cost. The Assessee highlighted that like any other entrepreneurial entity even it has to incur certain costs like HR, legal, finance etc. cost irrespective of the amount of business it undertakes during the year. The only differentiating factor in the case of the Assessee when compared to a similar third party is that the Assessee had availed the services from its AE. Had the Assessee availed the services from a third party, it would have incurred similar expenses.

8. The DRP, however, confirmed the order of AO holding that the assessee failed to prove the nature of services rendered by the AE. Aggrieved by the order of DRP which was incorporated in the final order of assessment, the assessee is in appeal before the Tribunal.

9. We have heard the submissions of the Id. Counsel for the assessee and the Id. DR. The Id. counsel for assessee drew our attention to an application filed by the assessee u/s. Rule 29 of the ITAT Rules, 1963, seeking to file additional evidence before the Tribunal. He brought to our notice that the assessee had filed the following evidence before the TPO and the DRP and he now seeks to file the evidence listed in Sl.No.9 of the chart given below as additional evidence :-

SI No	Nature of Expenses	Documentary Evidence	Page Number
1	Documentary proof evidencing travel and stay expenses of Jari Koppelo and Teemu Pokela visiting India to meet the customers on different dates	1. Debit Note raised by the AE 2. Travel Tickets and Boarding pass as proof of travel 3. Hotel bills as proof of stay in Bangalore India	141-168
2	Documentary proof evidencing travel and stay expenses of Ms. Riitta Ponnio visiting India to provide training on usage of a reporting software named Internal Management System (IM S) for generation of reports	1. Debit Note raised by the AE 2. Hotel bills as proof of stay in Bangalore India	169-172
3	Documentary proof evidencing travel and stay expenses of Mr. Thomas Grandberg visiting India to assist Incap India in development of New Products in SAP software, development of documentation management in SAP software, Task allocation within the team, and providing training to the employees of Incap India	1. Debit Note raised by the AE 2. Hotel bills as proof of stay in Bangalore India	173-176
4	Documentary proof evidencing travel of Ms. Riitta Ponnio to supervise the quality of the products, updation of Job matrix of the employees of Incap India etc.	1. Debit Note raised by the AE 2. Travel Tickets and Boarding pass as proof of travel 3. Hotel bills as proof of stay in Bangalore India	177-184
5	Documentary proof evidencing travel of Ms. Riitta Ponnio for Internal audit of Quality Management Systems (QMS) along with external auditors etc.	1. Debit Note raised by the AE 2. Hotel bills as proof of stay in Bangalore India	185-190
6	Documentary proof evidencing travel of Mr. Marko Tapanonaho visiting India for development of the engineering process for Incap India	1. Debit Note raised by the AE 2. Hotel bills as proof of stay in Bangalore India	191-194

7	Documentary proof evidencing travel of Mr. Kirsi Hellsten visiting India for SYMPA Human Resource Implementation system	1. Debit Note raised by the AE 2. Hotel bills as proof of stay in Bangalore India	195-196
8	Documentary proof evidencing travel of Mr. Marko Tapanonaho visiting India for development of the engineering process for Incap India	1. Debit Note raised by the AE 2. Hotel bills as proof of stay in Bangalore India	197-198
9	Email evidences for IT Support services received by Incap India from Incap Finland	Sample copy of emails for the services received	Attached as Annexure

10. It was his submission that the emails which are enclosed to the application for admission of additional evidence would show that the services were in fact rendered by the AE. According to him, the DRP/TPO did not examine the evidence, but made the addition in question on the basis that no evidence was filed by the assessee to show that services were rendered by the AE for which payment in question was made by the AE.

11. The Id. DR relied on the directions of the DRP.

12. After considering the rival submissions, we are of the view that the issue has not been examined in the proper perspective by the TPO and DRP. The evidence already filed as well as the additional evidence filed now need to be considered to see whether the persons visiting India had in fact rendered services to the assessee and whether the payment in question made to the AE can be regarded as at arm's length. Admittedly there is evidence to show that personnel travelled from outside India. The evidence now filed according to the learned counsel for the Assessee would show what type of services they rendered to the Assessee. The Id. counsel for assessee made submission that the assessee is willing to

produce such other evidence as may be insisted upon by the TPO/AO in the set aside proceedings, as the type of evidence that would satisfy the requirements on the issue are not known to the Assessee nor spelt out by the Revenue authorities. In our view, it would be in the interest of justice to set aside the order of AO and remand the issue for fresh consideration by the AO/TPO in the light of evidence already available on record and additional evidence now filed before the Tribunal. The assessee will also file such other evidence as the TPO may require to show that the payment in question was made for services which the assessee received from the AE and that the price paid is at arm's length. These grounds are treated as partly allowed for statistical purposes.

13. Ground Nos.4 to 7 raised by the assessee is with regard to the action of the revenue authorities in disallowing a sum of Rs.53,83,644 for depreciation on intellectual property rights in the form of customer relationship rights. As far as these grounds are concerned, the facts are that the assessee company which is engaged in the business of providing comprehensive contract manual services to equipment manufacturers and development of renewable energy like solar energy, entered into business transfer agreement with TVS Electronics Ltd. on 31.5.2007 to purchase the business of Contract Manufacturing Services [CMS] division as a going concern. The assessee paid a total consideration of Rs.43.33 crores for acquiring CMS division. The assessee claimed depreciation in AY 2009-10 which was the previous year in which CMS Division was acquired by the assessee as a going concern. Depreciation was claimed on a sum of Rs.67.491 crores which was value allocated to the customer relationship rights acquired by the assessee under the business transfer agreement by which CMS Division was taken over as a going concern.

14. The claim of assessee was negated by the revenue authorities. But in AY 2009-10, the Tribunal in ITA No.1469/Bang/2014 by its order dated

9.3.2016 directed the AO to allow the claim of assessee for depreciation on customer relationship rights with the following observations:-

“6. We have heard the rival submissions as well as considered the relevant material on record. The transaction of purchase of contract manufacturing service division of TVS Electronics Ltd. by the assessee vide BTA dt.31.5.2007 is slump sale as the consideration was agreed and paid in lump sum without assigning any value to specific assets. Therefore as per the agreement the consideration was paid lump sum without giving any details of payment for any specific assets. The business was purchased by the assessee and it was transferred by the TVS Electronics as an ongoing business/division. However, in its books of accounts the assessee has valued the fixed asset and intangibles as per the valuation made by the consultants as under :

	(in Rs. Million)
Land	29.013
Building	15.286
Plant and Machinery	39.230
Other Fixed Assets	14.076
Inventory	
- Raw material	92.062
- Finished and semi-finished goods	23.368
Debtors	97.793
Loans and Advances	45.410
Total Assets	356.238
Current Liabilities and Provisions	79.571
Net Assets taken over	276.667
Advance for building	53.614
Customer Relationships	67.491
Goodwill	25.563
Total value of assets taken over (Net)	423.335

Thus it is clear that the excess amount paid by the assessee over and above the value assigned to the various assets had been assigned to two intangibles namely “customer relationship” and “goodwill”. The assessee did not claim any depreciation on the

value of Rs.2.55 Crores assigned to the goodwill and therefore the same was not an issue before the authorities below. The assessee claimed depreciation in respect of the amount of Rs.6.74 Crores which was assigned to customer relationship (intangible). The assessee took a plea that this amount was paid as non-compete fees as the seller has expressed, agreed and undertook not to participate or engage in any jurisdiction as a owner or partner or as shareholder or in any capacity in the business of contract manufacturing services which was transferred to the assessee. Thus the learned Authorised Representative has referred to the Article 11 of BTA in support of his contention that the payment was made for non-compete fees. However, in the absence of any agreement between the parties for any consideration on account of non-compete fees as well as in the absence of any such value assigned to the non-compete fees in the books of accounts, we do not find any substance in the contention of the learned Authorised Representative that the said payment is made as non-compete fees. The assessee in its books of accounts has allocated sum to the intangible being customer relationship. Therefore, though the seller has agreed not to engage in any business for a period of three years or participate or engage as owner, partner shareholder, consultant, advisor or any other capacity solicit the employees of the CMS Business however in the absence of any intention of parties to pay consideration for such restrictive covenants in the agreement the payment in question cannot be regarded as non-compete fees. Therefore, the decision of the Hon'ble jurisdictional High Court in the case of Ingersoll Rand International India Ltd. (supra) will not help the case of the assessee. As regards the nature of payment in question, as treated by the assessee in the books of accounts being customer relationship, the issue is clearly decided against the assessee by the decision of the Hon'ble Delhi High Court in the case of Sharp Business System (supra). However, this can be looked from another angle because the Assessing Officer while denying the claim of depreciation has taken a view that the customer relationship rights are in the nature of goodwill as under : "The submissions made by company are considered. The assessee has relied upon section 32(1)(ii) of the Income Tax Act, stating that the wordings any other business or commercial rights of similar nature" gives scope to many such business or commercial rights including customer relationship rights which

are as per assessee almost in nature of goodwill. Hence there is no dispute that customer relationship rights are in nature of goodwill.” Therefore the claim of the assessee is required to be considered by treating the said payment as goodwill. The learned Authorised Representative of the assessee has relied upon the judgment of Hon'ble Supreme Court in the case of CIT Vs. Smsifs Securities Ltd. 348 ITR 302 and submitted that in view of the said judgment of the Hon'ble Supreme Court, goodwill eligible for depreciation as per the Section 31(1)(ii) of the Act. Since the assessee did not claim depreciation on goodwill in the return of income and even not made any claim before the CIT (Appeals). Therefore, the issue of allowing depreciation on goodwill has not been examined by the authorities below.”

15. The claim made in the present assessment year has to be allowed as a consequence of the acceptance of the assessee's claim in AY 2009-10. The reason for the AO and the DRP in not accepting the claim of assessee is based on the best judgment assessment in AY 2009-10, which no longer remains valid. In view of the decision of the Tribunal for AY 2009-10, we are of the view that the claim of assessee for depreciation on customer relationship rights has to be allowed. We hold and direct accordingly and allow grounds No.4 to 7.

16. As far as ground No.8 is concerned, the same is with regard to depreciation on goodwill. The goodwill in question was claimed to have been acquired as a result of business transfer agreement, whereby CMS Division of TVS Electronics was taken over as a going concern by the assessee. This issue also came up before the Tribunal for AY 2009-10 ITA No.1469/Bang/2014 and this Tribunal noticed that the claim for depreciation on goodwill was made by way of an additional ground and accordingly admitted the additional ground for adjudication but remanded the issue for fresh consideration by the AO. In the present assessment year, a similar claim was made by the assessee before the DRP, but the DRP refused to entertain the claim made by the assessee by holding that

without filing a revised return, the assessee cannot make any claim and in this regard placed reliance on the decision of the Hon'ble Supreme Court decision in the case of *Goetz (India) Ltd. v. Commissioner of Income Tax 12006] 157 Taxman 1(SC)*. We are of the view that the power of the appellate authorities including the DRP /CIT(A)/Tribunal is in no way circumscribed by the decisions referred to by the Hon'ble DRP and are applicable only to claim made before the AO. This legal position is by now well settled. The following decisions may be referred to in this regard viz., *Commissioner of Income-tax, Chennai v. Abhinitha Foundation (P.) Ltd. [2017] 83 taxmann.com 100 (Madras) CIT v. Prabhu Steel Industries (P.) Ltd [1988] 171 ITR 530 (Bombay) and CIT v. Pruthvi Brokers & Shareholders [2012] 23 taxmann.com 23 (Bom.)*. Accordingly, we direct the AO to examine the claim of assessee for deduction on account of goodwill.

17. Ground No.9 raised by the assessee is with regard to disallowance of provision for expenses. The ld. counsel for assessee could not point out as to how the expenditure which was claimed by way of provision was actually incurred or accrued to the assessee during the previous year, hence we find no merit in ground No.9 raised by the assessee.

18. As far as ground No.10 raised by the assessee with regard to stamp duty and ROC charges paid on account of increase in share capital during the relevant previous year is concerned, it was pointed out by the ld. counsel for assessee that convertible debentures were converted into equity shares and therefore the principle laid down by the Hon'ble Supreme Court in the case of *Punjab State Industrial Development Corporation Ltd. (225 ITR 792)* and *Brooke Bond India Ltd. (225 ITR 798)* will not be applicable. According to him, the decision of Hon'ble Supreme Court in the case of *CIT v. General Insurance Corporation (286 ITR 232)* wherein it was held that when bonus shares are issued, any expenditure in issue of bonus share should be regarded as revenue expenditure will apply. According to

him, there was no change in the capital base of the assessee and therefore the expenditure in question cannot be regarded as capital expenditure. We have considered the submissions of the ld. counsel for assessee and are of the view that the same is not applicable. By conversion of debentures into equity, there is a conversion of loan into capital and in that sense there is an increase in own capital of the assessee. Therefore, we are of the view that there was expansion of capital base(own capital) and therefore expenditure in question was rightly treated by the revenue authorities as in the nature of capital expenditure. We are therefore of the view that there is no merit in ground No.10 raised by the assessee. Accordingly the same is dismissed.

19. In the result, the appeal by the assessee is partly allowed.

Pronounced in the open court on this 30th day of December, 2019.

Sd/-

(D S SUNDER SINGH)
ACCOUNTANT MEMBER

Sd/-

(N V VASUDEVAN)
VICE PRESIDENT

Bangalore,

Dated, the 30th December, 2019.

/Desai S Murthy /

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.