



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

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT, AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA no.827/Mum./2016
(Assessment Year :2011-12)

Mahindra Heavy Engines Ltd.
(Earlier Mahindra Heavy Engines P. Ltd.
and earlier to this Mahindra Navistar
Engines Pvt. Ltd.), Mahindra Towers
P.K. Kurane Chowk, Worli
Mumbai 400 018 PAN-AAFCM0476N

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Circle-7(1)(1), Mumbai

..... Respondent

ITA no.7190/Mum./2017
(Assessment Year : 2013-14)

Mahindra Heavy Engines Ltd.
(Earlier Mahindra Heavy Engines P. Ltd.
and earlier to this Mahindra Navistar
Engines Pvt. Ltd.), Mahindra Towers
P.K. Kurane Chowk, Worli
Mumbai 400 018 PAN-AAFCM0476N

..... Appellant

v/s

Asstt. Commissioner of Income Tax
Circle-7(2)(1), Mumbai

..... Respondent

Revenue by : Shri Udhalraj Singh
Assessee by : Shri H.P. Mahajani

Date of Hearing - 05.11.2019

Date of Order - 16.01.2020

ORDER**PER SAKTIJIT DEY. J.M.**

The aforesaid appeals have been filed by the assessee against the assessment orders passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short "*the Act*") for the assessment years 2011-12 and 2013-14, in pursuance to the directions of learned Dispute Resolution Panel (DRP), Mumbai.

2. The issues in dispute in both the appeals are common. In grounds no.1 and 8 of ITA no.827/Mum./2016, corresponding to grounds no.1 to 13 of ITA no.7190/Mum./2017, the assessee has challenged the additions made on account of adjustment made to the arm's length price (ALP) of royalty paid to the Associated Enterprises (AE).

3. Brief facts are, the assessee, a resident company, is stated to be a joint venture of Mahindra & Mahindra (M&M) and International Truck and Engine Mauritius Holding Ltd. (ITEMH) which in turn is a step down subsidiary of Navistar International Corporation Inc. (NIC) of USA. The assessee is basically engaged in manufacture of diesel engines for 16T and 49T vehicles and supplies the engines primarily to Mahindra Navistar Automobiles Ltd. (MNAL) which has entered into joint venture for manufacturing trucks. For the assessment year under

dispute, the assessee filed its return of income on 29th November 2012, declaring loss of ₹ 63,97,93,497. Noticing that during the year under consideration, the assessee had entered into international transaction with its AE, the Assessing Officer made a reference to the Transfer Pricing Officer for determining the ALP of the international transaction. In the course of proceedings before him, the Transfer Pricing Officer noticed that the assessee had entered into an intellectual property agreement with Navistar Luxemburg Intellectual Co. on 1st November 2007, who is the sub-licensee of the base engine intellectual property. Whereas, MWM International industrial De Motores Da America Do Sul Ltda. (MWM) is the original developer of the Base Engine Intellectual property relating to certain variety of Engines. MWM has sub licensed, the IPR to the assessee through Navistar Luxemburg. The license, knowhow relates to technical/functional assets as well as improvement and upgrades to be given to the assessee for manufacture and sale of engines in India. The Transfer Pricing Officer further found that for providing the knowhow, etc., the assessee has paid an amount of ₹ 54,50,830, towards royalty to the AE. From the transfer pricing study report, the Transfer Pricing Officer found that the assessee has benchmarked the ALP of the royalty by using Comparable Uncontrolled Price (CUP) method. When called upon to justify the ALP of royalty payment, the assessee submitted that as per Reserve Bank of India guidelines,

royalty @ 5% of 8% can be paid. Thus, it was submitted that the rate prescribed by the RBI can be considered as CUP. Additionally, it was submitted that as per the search conducted in royaltystat database, eight comparables were selected and the royalty paid by the assessee to the AE was found to be at arm's length keeping in view the royalty paid by the comparables. The Transfer Pricing Officer, however, did not accept the submissions of the assessee. He observed, mere inter-company agreement would not justify the payment of royalty. He submitted, the assessee was unable to justify the payment of royalty considering the fact that it has borne considerable loss indicating thereby that the payment of royalty has not been profitable. Accordingly, he determined the ALP of the royalty at nil. Thereby, suggesting the adjustment of ₹ 54,50,830 to the ALP.

4. The learned Authorised Representative submitted, the identical issue in assessee's own case in assessment year 2010-11 has come up for consideration before the Tribunal and vide order dated 31st May 2019, in ITA no.605/Mum./2015, the Tribunal has restored the issue to the Assessing Officer/Transfer Pricing Officer with certain directions. She submitted, the issue may be restored back to the Assessing Officer in the impugned assessment year as well with similar direction.

5. The learned Departmental Representative agreed with the aforesaid submissions of the learned Authorised Representative.

6. After considering the rival submissions and having perused the material on record, we find that identical dispute relating to the determination of arm's length price of royalty paid to the AE arose in assessment year 2010-11 and the Transfer Pricing Officer, on more or less on similar reasoning, has determined the arm's length price of royalty paid to the AE at nil. When the dispute ultimately came up for consideration before the Tribunal in the order referred to above, the Co-ordinate Bench restored the issue back to the Assessing Officer/Transfer Pricing Officer with the following observations: –

"10. Upon careful consideration, we find that TPO in this case has asked the assessee to submit benchmark analysis report done on the basis of royalty research database. The assessee could not provide the same when proceedings were going on before the TPO. The same could be provided only before DRP. Learned DRP asked for the remand report from the TPO. Learned TPO refused to offer any comment on the documents submitted by the assessee on the ground that the same was not submitted earlier before him. Despite this learned DRP accepted the additional evidence and proceeded to observe that the report was unauthenticated in as much as it was unsigned and did not contain seal of the reporting party. We have gone through the copy of the said report submitted. We find that the said report is submitted by Altus International. It contains covering letter which contains full address and website address of the firm. Based on the report of Altus International, range of royalty rate is also mentioned in the covering letter. It has duly been signed by the partner of the firm. It also contains contact persons and phone number for any question regarding report. In these circumstances, in our considered opinion, rejection by DRP of the benchmarking report submitted by the assessee is not sustainable. In our considered opinion if authorities below have any doubt about the authenticity of the document, same could have very well inquired from the address and phone number mentioned therein. Hence in our considered opinion, interest of justice demands that this issue may be remitted to the TPO. Learned TPO is directed to consider this issue afresh in

accordance with our direction and observation as above. It is open to assessee to canvas other grounds also before TPO with this regard."

7. Facts being identical, following the aforesaid decision of the Tribunal, we restore the issue back to the file of the Assessing Officer / Transfer Pricing Officer for fresh adjudication keeping in view the directions of the Tribunal as reproduced above. These grounds are allowed for statistical purposes.

8. The next issue arising in ground no.9 in ITA no.827/Mum./2016, corresponding to the ground no.14, of ITA no.7190/Mum./ 2017, relates to the addition made of Sales Tax refund received under the incentive scheme.

9. Brief facts are, in the course of assessment proceedings for the assessment year 2011-12, the Assessing Officer noticed that the assessee on provisional basis has shown an amount of ₹ 2,67,99,238, as receivable towards Sales Tax refund/subsidy from the State Government under its industrial policy scheme. However, the assessee has not offered the said amount for taxation. When called upon to explain the reason for not doing so, it was submitted by the assessee that being a part of a consortium, the assessee is eligible for refund of Sales Tax (VAT and CST) under package scheme of incentive announced by the Government of Maharashtra. It was submitted,

since the said incentive is for generation of employment through industrial development, it is in the nature of capital receipt, hence, not taxable. The Assessing Officer did not accept the claim of the assessee. He observed, the assessee has not received any amount from the State Government under the incentive scheme, but from MNAL. Accordingly, he added back the same to the income of the assessee. Similarly, on identical reasoning, the Assessing Officer treated the Sales Tax refund / subsidy of ₹ 2,74,64,654, as revenue receipt and made it taxable at the hands of the assessee in the assessment year 2013-14. Being aggrieved with the aforesaid additions, the assessee raised objections before learned DRP.

10. Learned DRP, after considering the submissions of the assessee, did not find merit in them. Learned DRP observed, the assessee has not received any Sales Tax refund / subsidy directly from the State Government but has received from another group company. They observed, no eligibility certificate has been issued in the name of the assessee for availing Sales Tax refund / subsidy. Therefore, they rejected the objections of the assessee.

11. The learned Authorised Representative submitted, the assessee is a subsidiary of Mahindra & Mahindra Ltd. He submitted, Mahindra & Mahindra entered into an Memorandum of Understanding (MoU) with the Government of Maharashtra for setting-up of a separate subsidiary

company as a special purpose vehicle (SPV) to manufacture and sale new generation vehicles, engines, transmission and other aggregates and medium/ heavy commercial vehicles. He submitted, the MoU also provided that Mahindra & Mahindra can have separate joint venture arrangement for manufacture of medium and heavy commercial vehicles and separately for manufacture of engine for these medium and heavy commercial vehicles and for manufacturing earth moving and construction equipment. For this purpose, manufacturing facilities were set-up in the industrial area of Chakan in the District of Pune. He submitted, as per the terms of MoU, the Government of Maharashtra also agreed to provide incentive as per industrial promotion subsidy (IPS) scheme towards eligible investment in the project. He submitted, as per the terms of the MoU, the entities making eligible investment in the project of manufacturing passenger and commercial vehicles, engines, aggregates, etc. are, the Mahindra Vehicle Manufacturing Ltd. (MVML), which is created as a SPV, M&M, Mahindra Navistar Automobiles Ltd.(MNAL) and the assessee viz. Mahindra Navistar Engines Ltd. (MNEL). Taking us through various clauses of the MoU, the learned Authorised Representative submitted, as per Para-3.2.3, payment of industrial promotion subsidy (IPS) to the extent of 100% of the eligible investment subject to a ceiling of gross taxes (VAT and CST) paid by the SPV to Government of Maharashtra during the 20 years from the date of commencement of commercial production,

whichever is lower, is allowable in terms of the eligibility certificate. He submitted, as per the terms of the MoU the Government of Maharashtra disbursed IPS to MVML. He submitted, the ceiling of IPS being lower of eligible investment and VAT / CST paid by MVML, it was only entitled to IPS on VAT / CST paid by it on sale of commercial vehicle TO MNAL. He submitted, the commercial vehicles manufactured and sold by MVML to MNAL were fitted with engines manufactured by the assessee. He submitted, while MVML receives IPS on the basis of VAT paid by it on sale of commercial vehicles to MNAL, in turn, MNAL passes on the IPS to the assessee to the extent of VAT paid by the assessee on engines manufactured and sold to MVML and used in the commercial vehicles manufactured and sold by MVML to MNAL. He submitted, though, the eligibility certificate has been issued in the name of MVML being the SPV as per the MoU, however, the assessee is eligible to receive IPS on the VAT paid on engines manufactured by it and sold to MVML. He submitted, though, IPS as a whole was granted to MVML, however, IPS to the extent of VAT paid by the assessee on engines sold was distributed to the assessee by MVML. Hence, the receipt being in the nature of a capital receipt is not taxable. The learned Authorised Representative submitted, merely because the eligibility certificate is not in the name of the assessee, IPS received cannot be treated as revenue in nature ignoring all other facts and materials brought on record including the MoU between the

Government of Maharashtra and Mahindra & Mahindra Ltd. He submitted, in case of MVML, the Tribunal has upheld the decision of learned Commissioner (Appeals) in treating IPS as a capital receipt. Thus, he submitted, IPS/Sales Tax refund received by the assessee is not taxable.

12. The learned Departmental Representative, strongly relying upon the observations of the Assessing Officer and learned DRP submitted, as per the material on record, the eligibility certificate for grant of IPS was issued in the name of MVML and IPS was also granted to MVML. He submitted, IPS was never granted by the Government to the assessee. He submitted, due to an arrangement between MVML, the assessee might have received a part of IPS, however, it cannot be equated with IPS given by the Government of Maharashtra under the subsidy scheme. Drawing our attention to the eligible certificate submitted in the paper book, the learned Departmental Representative submitted, even as per the eligibility certificate no IPS is allowable to the assessee. Thus, he submitted, the claim of the assessee was rightly rejected and the amount was brought to tax.

13. We have considered rival submissions and perused the material on record. Undisputedly, the Assessing Officer has rejected assessee's claim regarding non-taxability of Sales Tax refund/subsidy primarily on the reasoning that no eligibility certificate for grant of such subsidy

has been issued in the name of the assessee. Further, the Assessing Officer has observed that the amount in dispute was not received by the assessee from the Government of Maharashtra, but, from MVML. Though, learned DRP has agreed that the subsidy/Sales Tax refund granted under IPS scheme is in the nature of capital receipt, however, they also held that in the absence of any eligibility certificate specifically issued in the name of the assessee, it cannot be held as a capital receipt. Further, learned DRP has observed that the subsidy scheme nowhere provides for a consortium. Learned DRP has also observed that the amount in dispute was not received by the assessee directly from the Government. It is relevant to observe, in course of hearing, learned Authorised Representative has furnished before us a copy of MoU between the Government of Maharashtra and M & M, as per which, the Government being keen to generate substantial employment wanted investment to be made through new ventures. In furtherance of such subject, M & M came forward to make substantial investment for a project to manufacture all kind of automotive products through a SPV. The MoU also allowed M & M to carry out such activity through its affiliates / joint venture companies by making eligible investments. The MoU also provided that benefits / incentives under the IPS would be available with regard to the eligible investments. Thus, as could be seen from the facts on record, in terms of MoU between the Government of Maharashtra and M & M, MVML

was created as a SPV to carry out the project of manufacturing and sale of commercial vehicles for which various components were provided by affiliates / subsidiary companies and one such company being the assessee, provided the engines for the commercial vehicles. It is the contention of the assessee, though, the eligible certificate has been issued in the name of the SPV but the entire project is being carried out by a consortium of companies and the assessee is a part of it. Therefore, the benefit IPS is available to all companies, including the assessee, forming the consortium. On a perusal of the MoU as well as the eligibility certificate, the aforesaid claim of the assessee to some extent appears to be acceptable. Therefore, merely because the eligibility certificate has been issued in the name of the SPV, it cannot be said that the entire eligible investment has been made by the SPV. In fact, a reference to Annexure-B to of the eligibility certificate, a copy of which is placed at Page-536 of the paper book, would reveal that it lists the details of investment made by the SPV (MVML) as well as other companies including the assessee for the project. Therefore, assessee's claim that it is also eligible for Sales Tax refund / subsidy under IPS carries some strength. If the assessee as a part of consortium has invested in the project, it is eligible for grant of incentive / subsidiary as permissible under the IPS.

14. However, at this stage, it is necessary to consider the submissions of learned Departmental Representative that Annexure-C to the eligibility certificate does not provide for any subsidy to the assessee. On a reference to Annexure-C of the eligibility certificate placed in the paper book, it is seen that the authority concerned has not allocated any IPS to the assessee on the reasoning that the fixed capital investment is less than ₹ 250 crore. To counter the aforesaid contention of the learned Departmental Representative, the learned Authorised Representative has submitted that Annexure-C to the eligibility certificate only refers to the direct eligibility of the assessee to IPS equal to the amount of VAT paid by it on engines directly sold to third parties and not the MVNL. It has been submitted that no such IPS since was received during the year, assessee's claim in the present appeal does not depend on the amount of eligible investment made by the assessee. The learned Authorised Representative has submitted, IPS claimed is the amount received by the assessee on the engines manufactured and sold to MVML. However, on a perusal of the assessment order as well as the order of learned DRP, we find that the aforesaid aspect of the issue has not at all been dealt with as nowhere in their respective orders the authority concerned have referred to or made any comment on Annexure-C to the eligibility certificate. Further, in the order passed by learned DRP and more specifically in Para-20.8 of the DRP's order, it has been specifically mentioned that

the assessee did not furnish any supporting evidence regarding formation of a consortium of companies for the purpose of setting-up of the mega project and setting out the defined role of each member of the consortium and whether the consortium has been recognized by the Government for implementing the scheme. Learned DRP has further observed that no details and evidences were provided regarding the agreement between the consortium members for allocation of benefit of Sales Tax refund received by the eligible units which set-up the mega project and the basis for such allocation. They have also observed that no evidence was produced whether such agreement, if there is one, has been recognized by the State Government. Learned DRP has observed that no details and evidences were furnished regarding the extent of Sales Tax refund receivable by the sister concern which holds the eligibility certificate, the basis on which it was allocated partly to the assessee and the treatment given to the allocated portion in the books of account of the sister concern. Thus, from the aforesaid observations of learned DRP it becomes clear that rejection of assessee's claim was also due to lack of supporting evidence. Though, the paper book submitted before us contains agreements between the assessee and MNVL for sharing of IPS, however, it does not contain the MoU between the Government of Maharashtra and M & M. Though, a copy of the aforesaid MoU was filed before us in the course of hearing, however, we are not sure whether

it was filed before the Departmental Authorities as it has not been referred to either by the Assessing Officer or by learned DRP. After carefully perusing the orders of the Departmental Authorities and considering the submissions of the parties, we are of the view that various documentary evidences which are part of record before us were either not available before the Departmental Authorities or even if available, were not considered by them. Since, learned DRP has made a categorical observation that various evidences were not furnished by the assessee to support its claim, we are of the view that the entire issue relating to assessee's claim of Sales Tax refund / subsidy being a capital receipt requires fresh consideration in the light of various documentary evidences, including, the MoU between the Government of Maharashtra and M&M. Further, the assessee is also required to meet the allegation of learned DRP that various documentary evidences were not furnished to support its claim. The assessee is also required to properly explain the impact of the observations made in Annexure-C to the eligibility certificate regarding eligibility of the assessee for payment of IPS. Since, all these aspects have not been considered properly for whatever may be the reason, we are inclined to restore this issue to the file of the Assessing Officer for de novo adjudication after providing reasonable opportunity of being heard to the assessee. The assessee is at liberty to furnish further evidences, if required, to prove its claim. The Assessing Officer

must consider not only the evidences filed but also the submissions made by the assessee while deciding the issue. Grounds are allowed for statistical purposes.

15. In ground no.10 of the appeal relating to assessment year 2011-12, the assessee has raised the issue of set-off of long term capital gain and income from other sources against current year's business loss.

16. The learned Authorised Representative has submitted before us, though the Assessing Officer has allowed the set-off in the body of the assessment order, but he failed to do so in the computation sheet annexed to the order.

17. Having considered the rival submissions, we direct the Assessing Officer to look into this matter and allow assessee's claim in accordance with law. Ground is allowed for statistical purposes.

18. Ground no.11, raised by the assessee in its appeal being ITA no.827/Mum./2016, and ground no.15, raised by the assessee in its appeal being ITA no.7190/Mum./2017, are on the issue of levy of interest under section 234D and recovery of interest u/s 244A.

19. These grounds being consequential in nature, not required to be adjudicated.

20. Grounds no.12 and 13, raised by the assessee in its appeal being ITA no.827/Mum./2016, and ground no.16, raised by the assessee in its appeal being in ITA no.7190/Mum./2017, are on the issue of initiation of penalty proceedings under section 271(1)(c) of the Act. These grounds having not been pressed are dismissed.

21. In the result, both the appeals of the assessee stand partly allowed for statistical purposes.

Order pronounced in the open Court on 16.01.2020

Sd/-
PRAMOD KUMAR
VICE PRESIDENT

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 16.01.2020

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