

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND
SHRI N.K.PRADHAN, ACCOUNTANT MEMBER
ITA NO.5142/MUM/2017(A.Y. 2010-11)

Altico Capital India Private Limited,
(Formerly Clearwater Capital
Partners India Private Limited,)
7th Floor, Mudra House,
Opp. Grand Hyatt, Santacruz(E),
Mumbai 400 055.
PAN:AACCC3064F

..... Appellant

Vs.

Dy. Commissioner of Income Tax,
Circle 3(1),
Aaykar Bhavan, M.K.Road,
Mumbai 400 020

..... Respondent

Appellant by : Shri Madhur Agrawal

Respondent by : Shri Ashish Heliwal

Date of hearing : 08/01/2010

Date of pronouncement : 10/01/2020

ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeal)-55, Mumbai [in short 'the CIT(A)]dated 30/03/2017 for the assessment year 2010-11.

2. Shri Madhur Agrawal appearing on behalf of the assessee submitted that the assessee is providing Investment Advisory Services.

The assessee is subsidiary of Clear Capital Partner, Cyprus. The assessee entered in international transaction within group entity based in Singapore. The assessee applied Transactional Net Margin Method (TNMM) as most appropriate method to benchmark its international transactions. The assessee selected seven comparables to determining the arm's length price of the international transactions. The TPO accepted TNMM as the most appropriate method however, the TPO excluded certain comparables selected by the assessee and introduced fresh comparables. The arithmetic mean of the final set of comparables selected by the TPO was 42.66% as against the average weighted margin of the comparables selected by the assessee at 18.23%. Thus, the TPO made upward adjustment of Rs.19,05,210/-. The Assessing Officer vide order dated 10/04/2014 passed under section 143(3) r.w.s. 144C(3) of the Income Tax Act, 1961 (in short 'the Act') made addition of Rs.98,05,210/- qua international transaction as proposed by the TPO.

3. The Id. Authorized Representative for the assessee submitted that apart from transfer pricing adjustment, the Assessing Officer further made addition of Rs.21,70,725/- account of mismatch in Form 26AS. The assessee received interest income of Rs.1,97,67,227/-. The assessee had received interest after deduction of TDS. Since the deductor failed to deposit TDS amount with the Government Exchequer the TDS deducted was not reflected in Form 26AS. Hence, the Assessing Officer made addition of Rs.21,70,725/- on account of mismatch in TDS statement and interest income reflected in books of account. The Id. Authorized Representative for the assessee contended that the Hon'ble Bombay High Court in the case of Yashpal Sahni Vs. ACIT, reported as 165 Taxman

144(Bom) has held that when it is established that tax has been deducted at source, the Revenue is barred from recovering TDS amount from deductee from whose income TDS amount has already been deducted. The Id. Authorized Representative for the assessee also referred to CBDT Office Memorandum dated 11/03/2016, wherein it has been mentioned that non-deposit of tax deducted at source by the deductor, provisions of section 205 of the Act bars the Department to recover TDS amount on whose behalf the amount has already been deducted.

4. Aggrieved against the assessment order the assessee filed appeal before CIT(A). The first appellate authority in respect of TP adjustment granted part relief to the assessee in deleting some of the comparables selected by the TPO . However, the CIT(A) erred in accepting Goldman Sachs and AGM India Advisors Pvt. as comparables. The Id. Authorized Representative for the assessee pointed that both these companies are rendering services to their subsidiaries / AEs only. Thus, they fail Related Party Transaction (RPT) filter. Though their inclusion would not materially effect the result of comparable analysis, however, in principle both these companies should be excluded. In respect of addition on account mismatch in Form 26AS, the Id. Authorized Representative for the assessee pointed that CIT(A) has failed to adjudicate the issue.

5. Per contra, Shri Ashish Heliwal representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee.

6. We have heard the submissions made by rival sides and have perused the orders of authorities below. The assessee in appeal has raised three grounds. Ground No.1 & 2 of the appeal relate to TP

adjustment. The assessee is primarily aggrieved against the selection of comparables. As far as the most appropriate method for determining arm's length price of international transaction with AE, the assessee has adopted TNMM, and the same has not been disturbed by the TPO. The assessee is providing Investment Advisory Services and has declared margin of 20%. The assessee selected following seven companies as comparables with average weighted margin of 18.23%:

- (1) Access India Advisors Limited,
- (2) Future Capital Advisors Pvt. Ltd.
- (3) ICRA Management Consulting Services
- (4) IDC India Limited
- (5) Informed Technologies Limited
- (6) Integrated Capital Services Limited
- (7) Kinetic Trust Limited

The TPO modified the list of comparables by excluding certain comparables and introducing fresh comparables. The final set of comparables selected by the TPO are as under:-

S.No.	Name of the comparable	OP/TC (%)
1.	Future Capital Investment Advisors Ltd.	15.71
2.	Future Capital Holdings Ltd.(Segment-Investment advisory)	31.68
3.	IDFC Investment Advisors Ltd.	36.62
4.	ICRA Online Ltd.	41.77
5.	Kshiti Investment Advisory Co.Ltd.	32.33
6.	Motilal Oswal Investment Advisors Pvt. Ltd.	97.87
	ARITHMETIC MEAN	42.66

7. The assessee assailed the findings of TPO and the final list of comparables before the CIT(A). The CIT(A) finally selected following four comparables.

- (1) Goldman Sachs
- (2) AGM India Advisors Pvt. Ltd.
- (3) ICRA Management Consultancy Services,
- (4) Future Capital Investment Pvt. Ltd.

The limited contention of the Id. Authorized Representative for the assessee is that though with the set of comparables selected by the CIT(A) OP/OC ratio of the comparables is within +/- 5% range, however, in principle Goldman Sachs and AGM India Advisors Pvt. Ltd. cannot be selected as comparables as they do not qualify RPT filter. The contention of the assessee is that both these companies are rendering services to their respective AEs only. We find merit in the contentions of the assessee. If the said entities fail to qualify RPT filter, they cannot be selected as comparables. We deem it appropriate to restore this issue back to the file of Assessing Officer/TPO for the limited purpose to verify whether Goldman Sachs and AGM India Pvt. Ltd. qualify RPT filter or not. If both these entities fail to qualify the said filter, they should be removed from the list of comparables. The ground No.1 & 2 of the appeal by the assessee are allowed for statistical purpose in the terms aforesaid.

8. In ground No.3 of the appeal, the assessee has assailed addition in respect of TDS amount deducted but not deposited by the deductor to the Government exchequer. The contention of the assessee is that the assessee has received interest income after deduction of tax at source. Due to mismatch of TDS in Form No.26AS vis-a-vis interest income declared by assessee in books of account, the Assessing Officer made addition of Rs.21,70,725/-. The Id. Authorized Representative for the assessee has drawn our attention to the mails and TDS summary

statement furnished before CIT(A) as Annexure-4 to substantiate that the deductor has confirmed deduction of tax at source on interest payments to the assessee.

9. The Hon'ble Bombay High Court in the case of Yashpal Sahni (supra) has held that where the assessee has been able to establish that the tax has been deducted at source, section 205 of the Act bars to recover TDS amount from the assessee (deductee). The relevant extract of the judgment of Hon'ble High Court in this regard is reproduced herein below:-

*24. As stated earlier, in the present case the petitioner-assessee has established that from his salary income, tax has been deducted at source by the employer-respondent No. 6 and, therefore, the revenue has to recover the said TDS amount with interest and penalty from the respondent No. 6 alone and the revenue cannot seek to recover the said amount from the petitioner-assessee in view of the specific bar contained under section 205 of the Act. The fact that the petitioner is not entitled to the credit of the tax deducted at source for the non-issuance of the TDS certificate by the respondent No. 6, cannot be a ground to recover the amount of tax deducted at source from the petitioner. **In other words, even if the credit of the TDS amount is not available to the petitioner-assessee for want of TDS certificate, the fact that the tax has been deducted at source from salary income of the petitioner would be sufficient to hold that as per section 205 of the Act, the revenue cannot recover the TDS amount with interest from the petitioner once again.***

(Emphasis by us)

The CBDT has also issued Office Memo dated 11/03/2016 in this regard. The same reads as under:-

“Sub: Non-deposit of tax deducted at source by the deductor- Recovery of demand against the deductee assessee.

Vide letter of even number dated 01.06.2015, the Board had issued directions to the field officers that in case of an assessee whose tax has been deducted at source but not deposited to the Government's account by the deductor, the deductee assessee shall not be called upon to pay the demand to the extent tax has been deducted from his income. It was further specified that section 205 of the Income-tax Act, 1961 puts a bar on direct demand against the assessee in such cases and the demand on account of tax credit mismatch in such situations cannot be enforced coercively.

2. However, instances have come to the notice of the Board that these directions are not being strictly followed by the field officers.

3. In view of the above, the Board hereby reiterates the instructions contained in its letter dated 01.06.2015 and directs the assessing officers not to enforce demands created on account of mismatch of credit due to non-payment of TDS amount to the credit of the Government by the deductor. These instructions may be brought to the notice of all assessing officers in your Region for compliance”

10. Thus, in view of judgment of Hon'ble Jurisdictional High Court(supra) and the Office Memorandum issued by CBDT(supra), we are of considered view that if assessee is able to establish that tax has already been deducted at source on interest payments, the TDS amount cannot be recovered from the assessee again. The issue is restored back to the file of Assessing Officer for the limited purpose to verify whether TDS amount has been deducted from interest payments. The assessee shall furnish necessary documents to substantiate deduction of TDS on the interest payment received by it. The Assessing Officer after examining the documents, if satisfied that the TDS has already been deducted, shall delete the addition. Ground No.3 of the appeal is allowed for statistical purpose, in the terms aforesaid.

11. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on Friday the 10th day of January, 2020.

Sd/-
(N.K.PRADHAN)
ACCOUNTANT MEMBER

Sd/-
(VIKAS AWASTHY)
JUDICIAL MEMBER

Mumbai, Dated 10/01/2020
Vm, Sr. PS(O/S)

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai