आयकर अपीलीय अधिकरण] पुणे न्यायपीठ "एक सदस्य" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "SMC", PUNE

BEFORE SHRI ANIL CHATURVEDI,
ACCOUNTANT MEMBER

आयकर अपील स / ITA No.1414/PUN/2019

निर्धारण वर्ष / Assessment Year : 2011-12

Dar A1 Handasah Consultants (Shair & Partners) India Private Limited,
Wing A, B Level – 2,
Tower 11, Cybercity – Magarpatta City, Hadapsar, Pune – 411 013.

..... अपीलार्थी / Appellant

PAN : AACCD6524H.

बनाम v/s

The Deputy Commissioner of Income Tax,
Circle 1(2), Pune.

..... प्रत्यर्थी / Respondent

Assessee by : Shri R.G. Agiwal, C.A.

Revenue by : Shri Bharat Deoraj Shegaonkar, DCIT.

सुनवाई की तारीख / Date of Hearing : 22.01.2020		घोषणा की तारीख / Date of Pronouncement: 23.01.2020

आदेश / ORDER

PER ANIL CHATURVEDI, AM :

1. This appeal filed by the assessee is emanating out of the order of Commissioner of Income Tax (Appeals) – 1, Pune dated 22.07.2019 for A.Y. 2011-12.

2. The relevant facts as culled out from the material on record are as under :-

Assessee is a Company stated to be engaged in the field of IT enabled design engineering mainly for building and infrastructure

development projects etc. Assessee electronically filed its return of income for A.Y. 2011-12 on 25.11.2011 declaring total income of Rs.7,02,971/-. Assessment u/s 143(3) of the Act was completed on 19.02.2015 accepting the return of income filed by the assessee. AO has noted that assessee has thereafter entered into a unilateral Advanced Pricing Agreement ('APA agreement') on 24.11.2015 with CBDT for A.Y. 2009-10 to 2017-18 and had filed the copies of the same to determine Arms Length Price (ALP) of international transactions. He has noted that APA agreement is applicable for F.Y's 2013-14 to F.Y. 2017-18 (APA years) and FY 2009-10 to 2012-13 (Rollback years). AO noted that as per the provisions of Sec.92CD(1) of the Act as per the APA agreement entered into by the assessee, the assessee was required to file modified return of income which was filed on 29.02.2016 declaring total income at Rs.7,02,970/-. The case was selected for scrutiny and thereafter assessment was framed u/s 143(3) r.w.s 92CD of the Act vide order dated 30.03.2017 and the total taxable income was determined at Rs.17,36,650/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide consolidated order for A.Ys.2010-11 and 2011-12 order dated 22.07.2019 (in appeal No.PN/CIT(A)-1/DCIT, Cir.1(2)/Pn/32 & 33/17-18) granted partial relief to the assessee. Aggrieved by the order of Ld.CIT(A), assessee is now in appeal and has raised the following grounds :

"Ground 1.

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in confirming the order of Deputy Commissioner of Income Tax, Circle 1 (2) ('learned AO'), to the extent following, by holding that there is no infirmity in the order of the learned AO.

Ground 2

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in confirming the action of the learned AO in denying the deduction under section 10A of Rs. 10,33,675 claimed in respect of the incremental invoicing pursuant to Advance Pricing Agreement for computing total income under the normal provisions of the Act.

Ground 3

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) failed to appreciate the scheme of the Act pertaining to provisions of Advance Pricing Agreement ('APA') enacted under section 92CD of the Act and pursuant to the said sceme whether the claim under section 10A of the Act is justified.

Ground 4

a) On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in confirming the action of the learned AO by holding that conditions prescribed under section 10A(3) of the Act with regard to bringing of convertible foreign exchange into India within the timelines prescribed have not been met in respect of the incremental invoicing pursuant to Advance Pricing Agreement ('APA')

b) On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) failed to appreciate that impugned foreign exchange was brought in India in fifteen days of raising of invoice and thus conditions prescribed under section 10A(3) of the Act are virtually satisfied.

Ground 5

On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in holding that proviso to section 92C(4) is applicable without appreciating the fact that the incremental invoicing is pursuant to signing of an APA and not due to enhancement of the Arms Length Price (ALP) by the AO. The claim of deduction under section 10A of the Act is a direct consequence of modification to the arm's length price by virtue of APA and therefore, invoking proviso to section 92C(4) is contrary to the provisions of law.

Ground 6.

The learned AO erred in initiation of penalty proceedings under Sec.271(1)(c) of the Act."

3. All the grounds being inter-connected are considered together.

4. On perusing the computation of the income filed by the assessee, AO noted that incremental invoicing as per APA agreement of Rs.10,33,675/- was added to the net profit arrived as per Profit and Loss

account and on the enhanced amount equivalent amount of Rs.10,33,675/-, deduction u/s 10A of the Act was claimed. The assessee was asked to show cause as to why the deduction u/s 10A of the Act should be allowed on the incremental invoicing amount of Rs.10,33,675/- as per the APA agreement. In response to the query, the assessee made the submissions which were not found acceptable to the AO as he was of the view that modifications to be done by the assessee in the return of income to be furnished u/s 92CD(1) of the Act are limited only to the issues as agreed for in the APA agreement.

5. In the present case, AO noted that while filing the modified return of income u/s 92CD(1) of the Act, assessee has also modified its claim of deduction u/s 10A of the Act by claiming higher deduction vis-à-vis the deduction claimed by it in the original return of income. AO was of the view that assessee is not empowered to claim for deduction u/s 10A of the Act of the additional amount. He was further of the view that the claim of the enhancement of deduction was also not admissible as it did not satisfy the conditions prescribed u/s 10A of the Act as in the instant case, the enhanced amount of sale value in respect of which assessee has claimed deduction has not been brought into India with the prescribed period of six months from the end of relevant previous year. He accordingly denied the additional deduction claimed by the assessee u/s 10A of the Act of Rs.10,33,675/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who upheld the order of AO.

Aggrieved by the order of Ld.CIT(A), assessee is now in appeal.

6. Before me, at the outset, Ld.A.R. submitted that identical issue arose in assessee's own case for A.Y. 2010-11 wherein the Ld.CIT(A) has passed a combined order before the Tribunal. The Tribunal vide order dated 02.12.2019 in ITA No.1413/PUN/2019 has held that provisions of Sec.92C(4) of the Act does not debar deduction u/s 10A of the Act on additional income in the assessment u/s 92CD and further if assessee is entitled to otherwise u/s 10A of the Act in respect of income offered by the assessee, the same cannot be denied. He pointed to the findings of the Tribunal. He thereafter submitted that since the facts in the year under consideration are identical to assessee's own case for A.Y. 2010-11, therefore following the order of the Tribunal for A.Y. 2010-11 the issue be decided in assessee's favour.

7. Ld. D.R. on the other hand supported the order of AO and Ld.CIT(A).

8. I have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to the claim of further deduction claimed by the assessee u/s 10A of the Act in consonance with the APA Agreement entered by the assessee. I find that identical issue arose in assessee's own case for A.Y. 2010-11 wherein the Co-ordinate Bench of the Tribunal decided the issue in favour of the assessee by observing as under :

> *"7. Having taken an overview of the relevant provisions of the APA, which are germane to the issue under consideration, let us proceed to examine the question as to whether the assessee, in the given facts and circumstances and as per law, is entitled to deduction u/s 10A in assessment u/s 92CD of the Act on the additional income offered in the modified return? The precise answer to the question can be found out by answering the following three sub-questions:-*

i. Whether proviso to 92C(4) debars deduction u/s 10A on additional income in assessment u/s 92CD?

ii. If no, whether assessment u/s 92CD provides for granting deduction u/s 10A?

iii. If yes, whether the assessee has satisfied the conditions of deduction u/s 10A?

i. Whether proviso to 92C(4) debars deduction u/s10A on additional income in assessment u/s 92CD?

8. The case of the AO is that the assessee cannot be allowed deduction u/s 10A in respect of the incremental income offered in the modified return, which as per the AO, is eloquently proscribed by the proviso to sub-section (4) of sections 92C/92CA of the Act. In this regard, it is seen that section 92C deals with the computation of ALP by the AO. Sub-section (4) provides that where an ALP is determined by the AO under sub-section (3): "the Assessing Officer may compute the total income of the assessee having regard to the arm's length price so determined". Proviso to this sub-section, which is the bedrock for the denial of the assessee's claim, states that ".... no deduction u/s.10A . . . . . shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section". Section 92CA, through which a reference is made by the AO to the TPO for determination of the ALP and thereafter the assessment is completed by the AO in terms of the TPO's order, provides through sub-section (4) that on receipt of order from the TPO, `the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C' in conformity with the ALP determined by the TPO. Thus, notwithstanding the ALP determination by the AO or the TPO, the assessment is finalized by the AO in terms of the mandate contained in sub-section (4) of section 92C, which specifically provides that no deduction u/s.10A shall be allowed in respect of the amount of income by which the total income is enhanced after computation of income under this sub-section. A close scrutiny of the crucial words in the proviso decodes that the denial of deduction is permissible only when, first there is computation of income under sub-section (4) of sections 92C/92CA of the Act and second, the total income is enhanced because of such computation, namely, by virtue of the transfer pricing adjustment. Thus, it is vivid that the proviso restricting the granting of deduction u/s.10A on enhanced income applies only where the computation of income is made under the sub-section (4) of sections 92C/92CA, which talks of making some transfer pricing addition by the AO. If the computation of income is neither u/s.92C nor 92CA, namely, no transfer pricing addition is made by the AO, then it is obvious that the proviso shall have no application and the fortiori is that there will not be any denial of deduction under the sections given in the proviso.

9. We have noted above the scheme of assessment u/s 92CD pursuant to the APA, under which the assessee is mandated to file modified returns in consonance with the APA. Thereafter, the assessment is made by the AO u/s. 92CD(3)/(4) in accordance with the APA. As the incremental income is offered by the assessee itself in the modified return in accordance with the APA, it cannot be equated with the computation of income u/ss. 92C/92CA of the Act, as the later provisions talks of making some transfer pricing addition by the AO. The suo motu offering of additional income by the assessee pursuant to the APA is of the same nature as the assessee itself offering some transfer pricing adjustment in the original return of income. In that case also, deduction u/s 10A, if otherwise permissible, would be

allowed and not curtailed as it will not be a case of transfer pricing addition made by the AO. In the same manner, deduction u/s 10A cannot be disallowed in respect of additional income offered in the modified return as it is not a transfer pricing addition made by the AO but the additional transfer pricing income offered by the assessee in consonance with the APA with the CBDT.

10. The second component for magnetizing the proviso is that the `total income of the assessee is enhanced'. An enhancement of income in this context pre-supposes some action of the authorities after the filing of the return of income by the assessee, which has the consequence of increasing the total income from the one declared by the assessee. Filing of the modified return u/s 92CD of the Act with the income as agreed between the assessee and the CBDT under the APA is an act of the assessee in offering the additional income and not an act of the AO in making the enhancement of the total income.

11. Instantly, we are dealing with a situation in which the assessee itself has filed a modified return of income at the mutually agreed rate of 17% under the APA. As such, there cannot be any question of the AO making any enhancement in the income as a result of transfer pricing adjustment so as to attract the proviso to section 92C(4) of the Act.

12. Thus the first sub-question is answered by holding that proviso to section 92C(4) does not per se debar deduction u/s 10A on additional income in assessment u/s 92CD.

ii. Whether assessment u/s 92CD provides for granting deduction u/s 10A?

13. Having answered the first question in negative, it remains to be decided as to whether the assessee is entitled to deduction u/s. 10A within the framework of the APA provisions. In this regard, it assumes significance to note the mandate of sub-section (2) of section 92CD of the Act, which provides that: "Save as otherwise provided in this section, all other provisions of this Act shall apply accordingly as if the modified return is a return furnished under section 139". A careful circumspection of sub-section (2) deciphers and delineates that in the computation of total income by the AO pursuant to the filing of the modified return by the assessee in terms of the APA, all other provisions of this Act shall apply accordingly. In other words, if an assessee is otherwise eligible for deduction under any other appropriate provision in respect of the income offered in the modified return, there cannot be any embargo on granting deduction under such relevant provision. The saving clause contained in sub-section (2), making all other provisions of the Act applicable in the assessment of the modified return, ostensibly includes the applicability of section 10A as well, of course, subject to the fulfillment of others conditions as set out in the section. It, therefore, follows that if an assessee is otherwise entitled to deduction u/s.10A, or for that matter under any other provision of the Act, in respect of the income offered in the modified return, the same cannot be denied. As such, the view of the authorities below that in the absence of any specific provision in section 92CD for granting of deduction u/s.10A, no deduction can be allowed, is sans merit. Such stipulation is contained in sub-section (2) of 92CD itself. It is, ergo, held that the assessment u/s 92CD provides for granting deduction u/s 10A of the Act.

iii. Whether the assessee has satisfied the conditions of deduction u/s 10A?

14. Now we turn to the view canvassed by the AO that the assessee failed to comply with the mandate of sub-section (3) of section 10A, which provides

that: "This section applies to the undertaking, if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into India, by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or within such further period as the competent authority may allow in this behalf". A perusal of sub-section (3) of section 10A transpires that the condition for bringing into India the requisite convertible foreign exchange within a period of six months from the end of the previous year is not be all end all of the issue. It also extends to "such further period as the competent authority may allow in this behalf". In other words, if the competent authority has allowed further period for bringing into India the convertible foreign exchange, the assessee will be entitled to deduction u/s.10A. Explanation 1 to section 10A(3) states that: `For the purposes of this sub-section, the expression "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.'

15. Sub-section (1) of section 92CC provides that "The Board, with the approval of the Central Government, may enter into an advance pricing agreement with any person . . . . . ". It is thus clear from the mandate of sub-section (1) of section 92CC that the CBDT enters into an APA with the approval of the Central Government. The APA is a package deal aimed at reducing litigation. If the APA contains some clause relaxing the rigor of any provision or to facilitate its workability, such a clause will prevail over the normal provisions of the Act. It is mandated by the legislature itself through sub-section (2) of section 92CD, which opens with a saving clause by providing: `Save as otherwise provided in this section', all other provisions of the Act shall apply. Sub-section (1) of section 92CD provides that: `…. such a person shall furnish …. a modified return in accordance with and limited to the agreement.' A corollary which follows on a harmonious construction of sub-sections (1) and (2) of section 92CD is that if the APA contains a clause departing from the normal provisions, it is such clause which shall prevail upon the normal provision.

16. We have gone through the APA entered between the assessee and the CBDT. Clause 7 of the APA discusses the "Critical assumptions". It provides that: `the critical assumptions (as referred to in the Rules) shall, for the purposes of this Agreement, be as specified in Appendix II.' Clause 5 of the Appendix II deals with 'Invoicing and Credit terms'. The material part of such a clause, which is relevant for the year under consideration, states that: `… the Applicant shall show the difference between the invoiced amount for the previous year/rollback years and the ALP as agreed, as tax adjustment in the modified tax returns for Assessment year 2010-11 to Assessment year 2014-15 and will also raise an invoice (and realise it) for the equivalent amount in the month following the month in which the Agreement is signed'. On going through the relevant parts of clause 5 of the Appendix II, it clearly emerges that the CBDT provided for raising the invoice for the additional amount and also 'realise it' in the month following the month in which the APA is signed. To put it simply, the CBDT not only stipulated for raising of the invoice for the additional income but also for the realization of the additional amount within the month following the month in which the Agreement is signed. Thus, it is overt that the APA contains a clause for realizing the amount or bringing into India convertible foreign exchange for the additional amount of invoice within one month's period. There can be no other reason for mandating in the APA for bringing into India convertible foreign exchange within one month following the month in which the APA is signed except for the granting the consequential benefits of such realization, even though sub-section (1) of section 92CD gives time of three months for filing the modified return. The sequitur is that the APA has

made it mandatory for the assessee to bring in convertible foreign exchange in India within one month. But for granting the relevant deductions connected with the realization of convertible foreign exchange in India, there was no purpose to stipulate it in the APA. This stipulation is, thus, a direction to grant deduction u/s 10A only if the assessee succeeds in bringing in convertible foreign exchange in India within one month, bringing the case within the saving clause of sub-section (2) of section 92CD. As the assessee brought into India the convertible foreign exchange within the stipulated one month's period, it became entitled to deduction u/s 10A.

17. What is further pertinent to note from para 2 of the Clause 6 of the APA is that: "The determination of ALP for Rollback years is subject to the condition that the ALP would get modified to the extent that it does not result in reducing the total income or increasing the total loss, as the case may be, of the applicant as already declared in the return of income of the said year". Reverting to facts of the extant case, it is seen that the assessee declared total income of Rs.45,21,431/- in the original return. After the increase in the income due to the APA and with the simultaneous claim of deduction u/s.10A, the total income of the assessee as declared in the modified return remained at the same level. Thus, it is neither a case of reducing the total income nor increasing the total loss. Ex consequenti, it is held that the assessee has satisfied the condition of deduction u/s 10A(3) read with section 92CD(2) of the Act.

18. To sum up, we hold that the proviso to section 92C(4) does not debar deduction u/s 10A on additional income in assessment u/s 92CD; assessment u/s 92CD provides for granting deduction u/s 10A; and the assessee has satisfied the requirement of section 10A(3) read with section 92CD(2), thereby entitling it to deduction u/s.10A on the additional amount of Rs.20,36,023/-. The impugned order is overturned and deduction is granted."

9. Before me, no material has been placed by Revenue to demonstrate that the order of Tribunal in assessee's own case for A.Y. 2010-11 (supra) has been set aside / stayed by higher Judicial Forum. Revenue has also not pointed out any distinguishing feature in the facts of the present case and in the case of assessee's own case in earlier year i.e., A.Y. 2010-11. I therefore, relying on the decision of the Tribunal in assessee's own case in A.Y. 2010-11 (supra) and for similar reasons direct the AO to grant deduction of Rs.10,33,675/- for A.Y. 2011-12 claimed in respect of the incremental invoicing pursuant to APA agreement for computing total income. **Thus, the grounds of the assessee are allowed.**

10. **In the result, the appeal of the assessee is allowed.**

Order pronounced on 23rd day of January, 2020.

Sd/-
(**ANIL CHATURVEDI**)
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 23rd January, 2020.
Yamini

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A) – 1, Pune.
4. Pr. CIT – 1, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "एक सदस्य" / DR, ITAT, "SMC" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

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वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.