

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "I-2": NEW DELHI**

**SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER  
AND  
SHRI O.P.KANT, ACCOUNTANT MEMBER**

ITA No. 388/Del/2016

Asstt. Year: 2011-12

M/s. SSP India (P) Ltd. Golf View Corporate Tower A, 5 <sup>th</sup> Floor, Sector Road, Sector-42 Gurgaon, Haryana 122002 PAN AAICS0682D	Vs.	Deputy Commissioner of Income Tax Circle-4, Gurgaon
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by:	Shri Gautam Jain, Adv. Ms. Monika Agarwal, CA
Department by :	Shri Mritujn Jay Barnwal Sr, DR
Date of Hearing	30/01/2020
Date of pronouncement	01/05/2020

**ORDER**

**PER SUDHANSHU SRIVASTAVA, JM:**

This appeal is preferred by the assessee against the final assessment order dated 18.11.2015 passed u/s 144C of the Income Tax Act 1961 (hereinafter called 'the Act') subsequent to the directions of the Ld. Dispute Resolution Panel (DRP) vide directions dated 28.10.2015 for assessment year 2011-12.

2.0 The brief facts of the case are that the assessee company is a 100% subsidiary of SSP Limited, United Kingdom which is engaged in supply of software services industry worldwide. The assessee company was incorporated on 21<sup>st</sup> April 2004 as Sirius Financial Solutions India Pvt. Ltd. and subsequently its name was changed to SSP India Pvt. Ltd. on 31<sup>st</sup> January, 2008. The return of income was filed declaring income at Rs. NIL. Subsequently the case picked up for scrutiny through CASS. During the course of assessment proceedings it was noticed that during the year under consideration, the assessee had entered into international transaction with its Associated Enterprises (AE). A reference was made to the Ld. Transfer Pricing Officer (TPO) for determining the Arms Length Price (ALP). The Ld. TPO proposed an adjustment of Rs. 1,36,95,705/-. The draft assessment order was passed incorporating the proposed transfer pricing adjustment and aggrieved the assessee approached the Ld. DRP. However the Ld. DRP also overruled the objections of the assessee company and the final assessment order was passed incorporating the transfer pricing adjustment as originally proposed. Now, the assessee has approached the ITAT and has raised the following grounds of appeal:-

1. *That the order of assessment u/s 144C(13) read with section 143(3) of the Act dated 18.11.2015 framed by learned Deputy Commissioner of Income Tax, Circle 4, Gurgaon is barred by limitation and deserves to be quashed as such.*
  - 1.1 *That impugned order of assessment though dated 18.11.2015 has been dispatched by the learned Deputy Commissioner of Income Tax on 14.12.2015 by speed post and finally served on 16.12.2015 and therefore the impugned order of assessment has been framed on 14.12.2015 i.e. after a period of one month from the end of month in which directions were received by the learned Assessing Officer u/s 144C(5) of the Act and thus, the same is barred by limitation.*
2. *That the learned Deputy Commissioner of Income Tax, Circle has erred both in law and on facts in determining total income u/s 115JB of the Act at Rs. 4,15,80,590/- as against income declared of Rs. 2,78,84,880/- by the appellant company.*
  - 2.1 *That while computing the aforesaid income the learned Deputy Commissioner of Income tax has failed to appreciate that adjustment made of Rs. 1,56,95,705/- to arms length price in respect of international transaction relating to provision of support services for development and maintenance of software to its parent company SSP(UK) Ltd. in pursuance to an order dated 16.1.2015 u/s 92CA(3) of the Act r/w an order dated 27.10.2015 u/s 144C(5) of the Act is beyond the scope and ambit of the adjustments provided in Explanation to section 115JB of Act.*
  - 2.2 *That even otherwise since the aforesaid adjustment was not part of the draft order of assessment dated 25.3.2015 u/s 144C(1) of the Act or part of directions by DRP in an order dated 27.10.2015 u/s 144C(5) of*

*the Act, the aforesaid adjustment is therefore illegal, invalid and untenable.*

3. That in any case the learned Deputy Commissioner of Income Tax, Circle 2, Gurgaon has erred both in law and on facts in making an adjustment of Rs. 1,36,95,705/- to arms length price in respect of international transaction relating to provision of support services for development and maintenance of software to its parent company SSP(UK) Ltd. in pursuance to an order dated 27.10.2015 u/s 144C(3) of the Act r/w an order dated 16.1.2015 u/s 92CA(3) of the Act.

3.1 That the learned AO/DRP/TPO has erred, on facts and in law, in rejecting the economic analysis in the documentation filed by the appellant company in terms of section 92D of the Act read with Rule 10D of the Income Tax Rules, 1962 ("the Rules") and re-determining the arm's length price of the impugned transactions.

3.2 That the learned AO/DRP/TPO erred, on facts and in law, in changing the filters applied by the appellant in the selection of the appropriate comparable companies for determination fo the arm's length price of the impugned transactions using the Transactional Net Margin Method ("TNMM") as the most appropriate method in the documentation maintained under section 92D of the Act read with Rule 10D of the Rules.

3.3 That the learned AO/DRP/TPO erred on facts and in law, in selecting (i) Acropetal Technologies Limited (Seg),(ii)e-Infochips Ltd. (iii) e-Zest Solutions Limited (iv) Infosys Ltd.(v) Wipro Technology Services Ltd.(vi) Mindtree Ltd. (seg.) (vii) Peristent Systems Ltd. (viii) Sasken Communication Technologies Ltd. (ix) Tata Ebese Ltd. (x) Thirdware Solutions (seg.) (xi)Zylog Systems Ltd. (xii) Larsen Tourbro Infratech Ltd. as comparable without appreciating that these comparables did not satisfy the Functional, Asset and Risk ("FAR") test vis-a-vis the appellant company

*in relating to software development services provided to AE.*

- 3.4 *That the learned AO/DRP/TPO erred, on facts and in law in not applying an upper turnover filter, while rejecting the comparables and thereby excluding (i) Mindtree Ltd. (Seg.), (ii) Infosys. Ltd. (iii) Persistent Systems Ltd. (iv) Sasken Communication Technologies Ltd. (v) Tata Elxsi Ltd. (vi) Wipro Technology Services Ltd. (Merged)(vii) Larsen & Tourbro Infotech Ltd. from the list of comparables.*
- 3.5 *That the Learned TPO erred, on facts and in law, by selecting certain companies as comparable for the impugned transaction(s) having exceptional or peculiar circumstances, inconsistent profits, non-ordinary profits during the period under consideration.*
- 3.6 *That while making aforesaid adjustment the learned AO/DRP/TPO has incorrectly included (i) E-Zest Solutions Limited (ii) Larsen & Turbo Infotech Ltd. and (iii) Persistent Systems Ltd. as comparables without properly appreciating the explanation tendered by appellant company and on irrelevant, illegal and arbitrary considerations even when these companies do not meet the comparability criteria.*
- 3.7 *That the learned AO/DRP/TPO were incorrect both in law and on facts in not considering profits of software development segment only when such results were available of M/s. Sasken Communication Technology Ltd. and M/s. Acropetal Technologies Ltd.*
- 3.8 *That the learned TPO/Hon'ble DRP, erred on facts and in law, in not considering FCS Software Solutions Ltd. and CTG-VAK Software & Exports Ltd. appearing as comparable companies for provision of software development services.*
- 3.9 *That the learned TPO/Hon'ble DRP erred on facts and in law that Larsen & Turbro Infotech Ltd. is*

*wrong in including companies of Larsen & Tubro Infotech Ltd. in final set of comparables which have been rejected by TPO in show cause notice and in body of final order.*

- 3.10 *That the learned TPO/Hon'ble DRP erred on facts and in law that M/s. Zylog Systems Ltd. is wrong in including companies in final et of comparables which were neither selected by assessee and nor selected in show cause notice by TPO on grounds that it was rejected in show cause notice.*
4. *That the learned AO/DRP/TPO erred erroneously incorrect, on facts and in law that the learned TPO was wrong in not making comparability adjustment to eliminate material effects of substantial differences as specified in Rule 10B(3)(ii)-adjustments for rental costs incurred by assessee in comparison to the rental/depreciation/lease costs incurred by the comparable to eliminate differences in costs and lead to consistent and reliable basis for comparison based purely on operational consideration.*
5. *That the learned AO/DRP/TPO erred on facts and in law by not making appropriate adjustment for risk differences between the appellant and the selected comparable companies in the arm's length price so determined for hte impugned transactions, as the appellant is remunerated on cost plus basis for impugned transactions and bears minimal risk.*
6. *That the learned AO/DRP/TPO were incorrect both in law and on facts in treating the miscellaneous income as operating income in some of the comparables and not considering provision for bad and doubtful debts as operating expenses.*
7. *That the learned DCIT/DRP/TPO have made the impugned addition in complete disregard of the facts and circumstances of the appellant company, provisions of law and material on record and therefore, such orders has been passed without properly appreciating the explanation tendered by the appellant company and on irrelevant,*

*illegal and arbitrary considerations and are thus vitiated orders and otherwise too, contrary to the principles of natural justice and thus bad in law and void ab initio.*

8. *That the learned Deputy Commissioner of Income Tax has erred both in law and on facts in levying interest under section 234B and 234C of the Act which are not leviable on the facts of the appellatant company.*

3.0 At the outset, the Ld. AR submitted that in the impugned order the AO has treated the transfer pricing adjustment as an adjustment under the provisions of Minimum Alternate Tax (MAT). It was submitted that the final assessment order was incorrect and legally not sustainable because the proposed transfer pricing adjustment of Rs. 13,695,705/- to the arms length price in respect of international transaction relating to provision of support services for development and maintenance of software to its parent company SSP (UK) was beyond the scope and ambit of adjustment provided in explanation 1 to section 115 JB of the Act. The Ld. AR submitted that the effective legal ground was ground No. 2 in assessee's appeal and if this ground was allowed, the entire transfer pricing adjustment would stand deleted and the other grounds would become academic in nature. To buttress this argument, the Ld. AR drew our attention to page 81 of the final assessment order and pointed out that in the

final computation done by the AO, the total income of the assessee for the year under consideration has been computed by making the adjustment to the income computed by applying the provisions of MAT. The Ld. AR also drew our attention to the computation filed by the assessee company along with the return of income and submitted that the income under normal provision of the Income Tax Act has been shown as NIL whereas while making the calculation under the MAT provisions the income has been calculated at Rs. 27,884,880/- which had been picked up by the AO in the final assessment order and the transfer pricing adjustment has been made to this income shown under the provisions of MAT. The Ld. AR submitted that, therefore, as per the provisions of the Act and the settled judicial precedents, no transfer pricing adjustment could have been made to the income computed under the provisions of MAT. The Ld. AR placed reliance on an order of the ITAT Delhi bench in the case of M/s Cash Edge India (Pvt.) Ltd. vs ITO in ITA No. 64/Del/2015 wherein vide order dated 23.09.2015 a coordinate bench of this Tribunal had held that except for adjustments provided in Explanation 1 to section 115JB (2) of the Act, no other transfer pricing adjustment can be made. Reliance was also placed on

another order of ITAT Mumbai Bench in the case of GTS e-Services Private Ltd. vs. ITO in ITA No. 1231/Mum/2017 wherein, vide order dated 3.7.2019, a similar view has been taken. It was submitted that in view of these precedents, the transfer pricing adjustment having been made to the income under MAT, the transfer pricing adjustment was not sustainable.

4.0 In response, the Ld. Sr. DR, while placing reliance on the orders of the lower authorities pleaded that it was a mere technical error and the same should not be the sole ground for deciding the issue and that the Ld. AR should argue on the other grounds raised in the grounds of appeal.

5.0 We have heard the rival submissions and have also perused the material on record. After going through the records, the computation of income as computed by the AO in the final assessment order and the computation of income as shown by the assessee in its return of income, we note that the contentions of the Ld. AR are correct in as much as the AO has picked up the income shown under MAT provisions by the assessee i.e. Rs. 27,884,880/- as the income to which the transfer pricing adjustment was to be made. Thus, in the final assessment order the AO has made the impugned addition of Rs. 13,695,705/- to

the income as computed under the provisions of MAT and has assessed the income at Rs. 41,580,585/- whereas the assessee had declared NIL income under the normal provision of the Act in its return of income. We also agree with the contention of the Ld. AR that no transfer pricing adjustment can be made to the income computed u/s 115JB of the Act. We find that the order of the ITAT Delhi Bench in the case of M/s Cash Edge India (Pvt.) Ltd. vs ITO in ITA No. 64/Del/2015 squarely covers the assessee's case in its favour. The relevant observations and findings of the ITAT are incorporated in Para 33 to 39 of the said order and the same are being reproduced here in under:-

*“33. The final issue for consideration is challenge raised by the assessee to the action of the AO in adding back transfer pricing adjustment of Rs. 1,18,93,468/- to income assessed under section 115JB(MAT).*

*34. In this regard, the learned counsel for the assessee submitted that the AO has added the transfer pricing adjustment of Rs. 1,18,93,468/- to the book profits of the Assessee under section 115JB of the Act without appreciating that book profits of the company cannot be adjusted except*

*as provided in Explanation I section 115JB(2) of the Act and that transfer pricing adjustment is not one of the adjustments contemplated under that Explanation. He placed reliance upon the following decisions to contend that except for adjustments provided in Explanation I section 115JB(2) of the Act, no other adjustment can be made to book profits under section 115JB of the Act :-*

*i. Apollo Tyres 255 ITR 273 (SC)*

*ii. Malayalam Manorma 300 ITR 251 (SC)*

*iii. DCIT v. Bisleri Sales Ltd. 151 TTJ 285 (Mum) (ITAT)*

*35. The Ld. Sr. DR on the other hand supported the order of the AO on the strength of the decision of the Special Bench of the Tribunal in the case of Rain Commodities v. DCIT: 92010) 40 SOT 265.*

*36. We have considered the rival submissions and perused the material on record. It is settled law that except for adjustments provided in Explanation I Section 115JB(2) of the Act, no other adjustment can be made to book profits under section 115JB of the Act. We find that the transfer pricing adjustment is not one of the adjustments contemplated under Explanation I section 115JB(2) of the Act and therefore could*

*not have been added back to the book profits under section 115JB.*

*37. The case-law relied upon by the Ld. Sr. DR i.e. decion of the Special Bench in the case of the Tribunal in Rain Commodities (supra) does not also advance the case of the Revenue. In that case the Special Bench was considering whether the AO can alter the net profits declared by an assessee. The Special Bench has, following the decision the apex court in Apollo Tyres and HCL Comnet (supra), inter alia, held that the AO cannot travel beyond the net profits declared by the assessee unless (a) it is discovered that profit and loss account is not drawn up in accordance with Part II and Part III of Schedule VI of the Companies Act, or (b) the incorrect accounting policies, accounting standards ahve been adopted for preparing such accounts and the method/rate of depreciation has been incorrectly adopted for preparation of prif and loss account.*

*38. In the present case there is no allegation is the assessment order much less any finding that either that profit and loss account has been drawn up in accordance with Part II and Part III of Schedule VI of the Companies Act, or that*

*any incorrect accounting policies, accounting standards has been adopted for preparing such accounts or that the method/rate of depreciation has been incorrectly adopted for preparation of profit and loss account.*

39. *In view of aforesaid, we hold that the AO erred in adding back the transfer pricing adjustment of the book profits under section 115JB of the Act. Accordingly, this ground of the appeal raised by the assessee is allowed and the AO is directed to exclude the transfer pricing adjustment, if such adjustment survives, from the book profits computed under section 115JB of the Act.”*

5.1 We also note that the ITAT Mumbai Bench also followed this order of ITAT Delhi bench in the case of GTS e-Services Pvt. Ltd. vs. ITO in ITA No. 1231/Mum/2017.

5.2 Thus, in view of the settled judicial precedent, it is our considered opinion that the AO could not have made the transfer pricing adjustment to the income computed under the provisions of MAT. Therefore, respectfully following the aforesaid judicial precedents, we direct the AO to delete the impugned adjustment.

5.3 Since we have allowed ground No. 2 of the assessee's appeal and have directed the deletion of the entire transfer pricing

adjustment, the other grounds raised by the assessee become academic and are not being adjudicated.

6.0 In the final result the appeal of the assessee stands allowed.

**Order pronounced on 1<sup>st</sup> May, 2020.**

sd/-

**( O.P. KANT )  
ACCOUNTANT MEMBER**

sd/-

**(SUDHANSHU SRIVASTAVA)  
JUDICIAL MEMBER**

Dated: 01/05/2020

***Veena***

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi