

THE INCOME TAX APPELLATE TRIBUNAL  
"J" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER)  
AND  
SHRI RAJESH KUMAR (ACCOUNTANT MEMBER)

I.T.A. No.7364/Mum/2018  
(Assessment year 2014-15)

Mahindra Heavy Engines Ltd Mahindra Towers, P.K. Kurne Chowk Worli, Mumbai-400 018 PAN : AAFCM0476N	vs	ACIT,Circle 7(2)(1), Mumbai
<b>APPELLANT</b>		<b>RESPONDENT</b>

Appellant by	Shri H.P. Mahajani, AR
Respondent by	Shri A Mohan [CIT(DR)]

Date of hearing	04-03-2021
Date of pronouncement	11-03-2021

**ORDER**

**Per Saktijit Dey (JM):**

Captioned appeal of the assessee arises out of the final assessment order dated 30-10-2018 passed u/s 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 r.w.s. 144C(13) of the Income-tax Act, 1961 for the assessment year 2014-15.

2. In grounds 1 to 5, assessee has challenged the addition of Rs.1,82,21,046/- on account of adjustment made to the arm's length price towards payment of royalty.

3. Briefly, the facts are, the assessee is a resident company and is stated to be a joint venture between Mahindra & Mahindra Ltd and International Truck & Engine Mauritius Holdings Ltd. Basically, assessee is engaged in manufacture of diesel engine for 16T and 49T vehicles and supplies such engines primarily to Mahindra Navistar Automobiles Ltd. In course of transfer pricing proceedings, the transfer pricing officer (PTO, hereinafter called) noticed that the assessee had entered into an intellectual property agreement with Navistar Luxemburg Intellectual Co. on 01<sup>st</sup> November, 2007. The TPO alleged that under the said agreement, the assessee received licence and know how relating to technical / functional asset as well as improvement and brokerage for manufacture and sale of engines in India. He also found that the assessee has paid certain amount to the associated enterprise (AE, hereinafter) towards royalty. Though the assessee had benchmarked the payment of royalty by applying CUP method and claimed the transaction with the AE to be at arm's length; however, the TPO was not convinced. After rejecting the transfer pricing study report, the TPO ultimately held that payment of royalty to the AE is not justified; accordingly, determined the arm's length price of royalty payment at Nil. The adjustment made by the TPO was also upheld by the Ld.Dispute Resolution Panel (DRP, hereinafter called).

4. We have heard Shri HP Mahajani, Ld.Authorised Representative and Shri A Mohan, Ld.departmental representative. It is a common point between the parties that the disputed issue is squarely covered by the decision of the Tribunal in assessee's own case in AYS 2010-11 & 2011-12 wherein the Tribunal has restored the issue to the AO for fresh adjudication with certain directions. Therefore, he has submitted that the issue has to be restored to the assessing officer for the impugned assessment year, as well.

5. Having considered rival submissions, we find that while deciding identical issue in assessee's own case in A.Y. 2010-11 in ITA No.605/Mum/2015 dated 31-05-2019, the co-ordinate bench has restored the issue back to the assessing officer for fresh adjudication with certain directions. Following the aforesaid order, the Tribunal, while deciding identical issue in assessee's own case in assessment years 2011-12 and 2013-14, vide order in ITA Nos 827/Mum/2016 and 7190/Mum/2017 dated 16-01-2020, has restored the issue to the assessing officer for fresh adjudication, observing as under:-

*"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."*

6. Facts being identical, respectfully following the decisions of the Tribunal in assessee's own case, as referred to above, we restore the issue to the assessing officer for fresh adjudication keeping in view the directions of the Tribunal for the earlier years. Grounds are allowed, for statistical purpose.

7. In ground 6, the assessee has challenged the decision of the departmental authorities in not treating the industrial promotion subsidy received under the Government of Maharashtra Tech Scheme of Incentives 2007, as a capital receipt.

8. At the time of hearing, Ld.counsels appearing for the parties have agreed before us that while deciding identical issue in assessee's own case for assessment years 2011-12 and 2013-14, the Tribunal has restored the issue back to the file of the assessing officer for fresh adjudication with certain directions. Thus, it was submitted, the issue has to be restored back to the assessing officer for fresh adjudication in the impugned assessment year, as well.

9. Having considered rival submissions, we find that while deciding identical issue in assessee's own case for AYs 2011-12 and 2013-14 in ITA Nos.827/Mum/2016 and 7190/Mum/2017 dated 16-01-2020, the co-ordinate

bench has restored the issue to the assessing officer for fresh adjudication with the following observations:-

*“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."*

10. Facts being identical, respectfully following the aforesaid decision of the co-ordinate bench, we restore the issue back to the file of the assessing officer, for fresh adjudication, keeping in view the directions of the Tribunal in the order referred to above and only after due opportunity of being heard to the assessee. This ground is allowed, for statistical purpose.

11. Ground 7 raised by the assessee challenging the initiation of penalty proceedings u/s 271(1)(c) being premature at this stage, is dismissed.
12. In the result, appeal is partly allowed, for statistical purpose.

Order pronounced on 11/03/2021.

Sd/-

sd/-

<b>(RAJESH KUMAR)</b>	<b>SAKTIJIT DEY</b>
<b>ACCOUNTANT MEMBER</b>	<b>JUDICIAL MEMBER</b>

Mumbai, Dt : 11/03/2021

Pavanoan

Copy to :

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

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By Order

Asstt. Registrar, ITAT, Mumbai