

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "K", MUMBAI**

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT AND

SHRI SAKTIJIT DEY, JUDICIAL MEMBER

IT(TP)A No. 3404/MUM/2017

Assessment Year: 2012-13

India Factoring & Finance Solutions Pvt. Ltd., Unit No. 201, 2 nd Floor, Vibgyor Tower, Plot No. C-62, near Citi Bank, Bandra Kurla Complex, Mumbai - 400051 PAN: AACCI1918C	Vs.	The Deputy Commissioner of Income Tax, Circle-14(2)(1), Aaykar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Assessee by : Shri Girish Dave (AR)

Revenue by : Shri Sushil Kumar Mishra (DR)

Date of Hearing: 08/07/2021

Date of Pronouncement: 20/07/2021

ORDER

PER SAKTIJIT DEY, JM

This is an appeal by the assessee against assessment order dated 31.01.2017 passed for the assessment year 2012-13 in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. In ground no. 1 to 5, assessee has challenged the Transfer Pricing Adjustment of Rs. 8,41,616/-.

3. Briefly the facts are, the assessee is a resident company. As stated by the Transfer Pricing Officer (TPO), the object of the assessee is to provide factoring and forfeiting services, encompassing finance and value added services to business entities in India. As stated, currently the factoring services offered by the assessee are domestic factoring. The key goal of the assessee is to provide receivables finance and management solutions for its clients. As

observed by TPO, assessee's current clientele include small and medium enterprises (SMEs) in pharmaceuticals, textiles, automotive parts and ancillary, information technology and steel sectors. For the assessment year under dispute, the assessee had entered into certain international transactions with its overseas Associated Enterprises (AE), FIM Business Solution Ltd., Malta. Precisely, the assessee paid an amount of Rs. 38,38,741/- as software lease expenses to the AE for leasing a software viz. Kastle Factoring System for a term of seven years, subject to, renewal for a period of one year at a time. As per the terms of the agreement, the AE would also provide software maintenance and support services, implementation and configuration service, customization services, technical consultancy and training services and disaster recovery services. He found that the assessee had benchmarked the transaction with the AE by applying "other method" as provided under rule 10AB. While doing so, assessee has relied upon quotations obtained from two independent software service providers viz. Aditya Birla Minacs IT Services and Viyana Software. Ultimately, the assessee had claimed the payment made for leasing software to be at arm's length. On perusal of the lease agreement with the AE, the TPO noticed that though as per the terms of the agreement, the assessee was required to undertake liability to bear the applicable VAT on the leased software, however, the assessee has also taken up the additional responsibility of paying withholding tax and service tax amounting to Rs. 5,82,151/- and Rs. 2,59,465/- respectively. Being of the view that both withholding tax and service tax should have been paid by the AE, the TPO held that the amount paid towards service tax and withholding tax aggregating to Rs. 8,41,616/- being in excess of the arm's length price has to be adjusted. Accordingly, he proposed adjustment of the said amount. Learned DRP also sustained the adjustment proposed by the TPO.

4. The learned Counsel for the assessee submitted, as per the terms of the agreement the assessee was also required to pay withholding tax and service tax to the AE. Whereas, the learned Departmental Representative strongly relied upon the observations of the TPO and learned DRP.

5. We have considered rival submissions and perused the material on record. On a perusal of master services agreement between the assessee and AE, a copy of which is at page 91 of the paper book, we find the following clause “any charges payable under this agreement are exclusive of value added tax or any equivalent which shall be paid by the client additionally in accordance with the prevailing legislation at the tax point date, if applicable as well as any bank charges as might be applicable”. Thus, the crucial words which needs to be taken note of are **‘value added tax or any equivalent’**. On specific query from the Bench as to whether withholding tax and service tax are equivalent to value added tax, learned counsel for the assessee fairly submitted that they cannot be equated. In our considered opinion, value added tax on one hand and withholding tax as well as service tax on the other, are of distinct and different genre, hence, cannot be equated. Therefore, the terms of the agreement do not provide for payment of withholding tax and service tax to the AE. That being the case, in our opinion, the TPO was justified in making the adjustment of Rs. 8,41,616/-, being the amount of service tax and withholding tax paid additionally by the assessee over and above the payment to be made in terms of the agreement. These grounds are dismissed.

6. In ground no. 6, assessee has challenged the disallowance of software lease payment of Rs. 29,96,384/- under section 37(1) of the Income Tax Act, 1961.

7. Briefly the facts are, in course of assessment proceedings, the assessing officer (AO) called upon the assessee to prove that the software lease expenses were incurred wholly and exclusively for the purpose of business. Alleging that the assessee failed to furnish the required details and evidences to substantiate its claim, the AO disallowed the expenses. On the very same reasoning that the assessee did not produce documentary evidences to substantiate its claim, learned DRP also sustained the disallowance.

8. Learned counsel for the assessee submitted, the allegations of the departmental authorities that the assessee did not furnish the details and documentary evidences to substantiate its claim is baseless and not borne out

from record. He submitted, not only before the AO but even before learned DRP, the assessee had furnished all the details relating to the software lease expenses. In this context, he drew our attention to the documentary evidences placed in the paper book relating to the details of software lease. Further, he submitted, the aforesaid transaction relating to leasing of the software was subject matter of proceedings before the TPO and the TPO has accepted the transaction as genuine and determined the arm's length price. Thus, he submitted, the expenditure incurred being wholly and exclusively for the purpose of business should be allowed.

9. The learned Departmental Representative strongly relied upon the observations of the AO and learned DRP.

10. We have considered rival submissions and perused the materials on record. It is evident, the assessee has entered into a master services agreement with its AE, FIM Business Solution Ltd. on 10.12.2010 for taking on lease software viz. Kastle Factoring for a period of seven years. In fact, the aforesaid software was taken on lease in the preceding assessment year, wherein, the assessee has also made some payment towards leasing the software. Thus, this is not the first time the assessee is making payment towards software lease expenses. On a reading of the master services agreement, it is evident, the assessee requires the software for its business activities. In fact, while examining the arm's length nature of software lease expenses paid to the AE, the TPO has gone through all the evidences including the master services agreement. However, except the additional amount paid on account of withholding tax and service tax, the TPO has not found any wrong doing by the assessee in respect of software lease expenses. Further, on perusing the materials placed before us in the paper book, we are also convinced that the allegation of the departmental authorities that the assessee failed to furnish details and documentary evidences to establish its claim is not borne out from record. In view of the aforesaid, we delete the disallowance. This ground is allowed.

11. In ground no. 7, the assessee challenged the disallowance of referral fee of Rs. 23,67,000/- paid to M/s Blend Financial Services Ltd.

12. Briefly the facts are, in course of assessment proceedings, the AO while verifying the accounts of the assessee noticed that the assessee has debited an amount of Rs. 23,67,000/- towards referral fee. As observed by the AO, vide order sheet noting dated 09.02.2016, he called upon the assessee to furnish the details regarding the expenses with supporting evidences. Alleging that the assessee failed to furnish the details of referral expenses which supporting evidences to demonstrate that such expense was incurred wholly and exclusively for the purpose of business, the AO disallowed the expenses. Objection raised by the assessee challenging the aforesaid disallowance was also rejected by the learned DRP.

13. Learned counsel for the assessee submitted, the allegation of the departmental authorities that the assessee did not furnish documentary evidence to justify its claim is completely baseless and contrary to facts on record. Drawing our attention to referral agreement dated 01.02.2011 entered with Blend Financial Services Ltd., a copy of which at page 217 of the paper book, learned counsel submitted, the referral agreement was entered into for the growth of the assessee and entirely for its business interest. In this context, he drew our attention to various clauses of the agreement. Further, he submitted, in course of proceedings before the departmental authorities not only the referral agreement was furnished but various other documentary evidences including the list of clients referred by Blend Financial Services Ltd and the income earned from such clients, invoices raised, certificates issued in Form 16-A for deduction of tax at source etc. were furnished. He submitted, ignoring all these documentary evidences placed on record, both the AO and learned DRP have disallowed the expenditure by making general observation that supporting evidences were not filed. Thus, he submitted, the disallowance made should be deleted.

14. Learned Departmental Representative strongly relied upon the observations of the AO and DRP.

15. We have considered rival submissions and perused the material on record. Undisputedly, both the AO and learned DRP have disallowed assessee's claim on the reasoning that details with supporting evidences to establish the business expediency of referral fee were not submitted by the assessee. However, on perusal of documentary evidences placed in the paper book filed before us, we find that not only the referral agreement with Blend Financial Ltd. has been furnished before the departmental authorities but various other documents, such as, statements showing the list of clients referred by Blend Financial and income received from them, invoices raised to the clients and Form 16-A were furnished. A reference to clause 2.1 of the referral agreement shows that as per the terms of the agreement, Blend Financial is required to introduce and refer potential clients to the assessee and create business opportunities to enable the assessee to develop relationship and general business. It appears from the facts and evidences placed on record, by entering into the referral agreement with Blend Financial Ltd. business opportunity has grown as assessee has increased its client base resulting in substantial increase in revenue.

16. Thus, the facts and evidences on record clearly demonstrate that the referral fees paid by the assessee is wholly and exclusively for the purpose of its business. In any case of the matter, it is for the assessee to decided how to conduct its business. So long as the expenditure incurred is for the purpose of the business, it has to be allowed as revenue expenditure irrespective of the fact, whether it ultimately translates into earning of income. Certainly, the departmental authorities cannot step into shoes of the assessee to question a prudent business decision. In any case of the matter, the allegation of the departmental authorities that the assessee failed to furnish supporting evidence to demonstrate that the expenditure incurred is wholly and exclusively for the purpose of business is contrary to the facts on record. In view of the aforesaid, we delete the disallowance. This ground is allowed.

17. In ground nos. 8 and 9 assessee has challenged disallowance of Rs. 42,69,567/-, being expenditure incurred towards improvement of the lease hold premises.

18. Briefly the facts are, in course of assessment proceedings the AO noticed that the assessee has debited an amount of Rs. 42,69,567/- towards lease hold premise improvement expenses. Therefore, he called for the necessary details. In response to the query raised by the AO, the assessee furnished its explanation stating that the expenditure incurred mainly relate to interior work and installation of work station. However, the AO observed that the assessee did not submit the details of work carried out for which expenditure was incurred. Being of the view that the expenditure incurred is for future benefit from the existing asset and due to which capital value of the asset has increased, the AO treated the expenditure to be of capital nature and disallowed. Learned DRP also sustained the disallowance accepting the reasoning of the AO.

19. Learned counsel for the assessee submitted, in course of proceedings before departmental authorities, the assessee has furnished all details relating to the expenditure claimed. He submitted, without properly examining the documentary evidences both the AO and learned DRP have disallowed the expenditure by treating it as capital in nature. Further, he submitted, the expenditure incurred is for interior work, repairs and making wooden partition etc. which are of temporary nature. He submitted, by making such expenditure assessee has not created any asset of enduring nature. Therefore, the expenditure incurred should be allowed as revenue expenditure. In support of such contention, he relied upon a decision of the Hon'ble Kerala High Court in case of Joy Alukkas India (P.) Ltd. Vs. ACIT (2014) 49 taxmann.com 437 (Kerala).

20. The learned Departmental Representative strongly relying upon the observations of the AO and learned DRP submitted, the assessee did not furnish any documentary evidence to establish that the expenditure incurred

did not create any asset of enduring benefit. Therefore, the disallowance is justified.

21. We have considered rival submissions and perused the materials on record. As could be seen, the AO while dealing with the issue in the assessment order has observed that in response to query raised regarding the nature of expenditure, the assessee has simply furnished the heads under which the expenses were incurred and has further stated that they were mainly on account of interior work and installation of work station. The allegation of the departmental authorities that the assessee did not furnish the details of expenditure may not be fully correct. On a perusal of documents furnished before us and particularly the invoices, we find that the expenditure incurred are for variety of work, such as, demolishing and removing certain civil construction, installation of certain furniture and fixtures including chairs, tables, work station, plumbing, wooden partition, light fitting, civil construction etc. Thus, as it appears, though, major part of the expenditure may be of temporary nature, however, some of the work could be of enduring nature. Further, it can also be a fact that the assessee may not be having all supporting evidences to prove the expenditure. Thus, there is possibility of inflation of expenditure to some extent. Further, at this late stage it would be difficult to examine the nature of each item of expenditure to find out whether it is capital or revenue. Considering all these factors, we are of the view that 25% of the expenditure claimed should be disallowed to take care of the revenue leakage, if any, arising due to lack of supporting evidence and possible inflation in expenditure. These grounds are partly allowed.

22. In the result, appeal is partly allowed.

Order pronounced in the open court on 20th July, 2021.

Sd/-
(PRAMOD KUMAR)
VICE PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 20.07.2021
Alindra, PS

आदेश प्रतिलिपि अग्रेषित/ Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**