

आयकर अपीलीय अधिकरण
मुंबई पीठ "जे" मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री एम.बालागानेश, लेखासदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI M.BALAGANESH, ACCOUNTANT MEMBER
आअसं.7721/मुं/2012(नि.व. 2008-09)
ITA No. 7721/MUM/2012 (A.Y.2008-09)
आअसं.1429/मुं/2014(नि.व. 2009-10)
ITA No. 1429/MUM/2014 (A.Y.2009-10)

Sony Pictures Networks India Pvt. Ltd.,
(Formerly known as Multi Screen Media Pvt. Ltd.),
Interface Building 7, 4th Floor,
Malad Link Road, Malad (West), Mumbai-400064
PAN: AABCS1728D

..... अपीलार्थी/Appellant

बनाम Vs.

The ACIT, Central Circle-20,
Room No. 402,
AayakarBhavan, M.K. Road,
Mumbai-400020.

..... प्रतिवादी/Respondent

आअसं.1178/मुं/2014(नि.व. 2009-10)
ITA No. 1178/MUM/2014 (A.Y.2009-10)

The ACIT, Central Circle-20,
Room No. 402,
AayakarBhavan, M.K. Road, Mumbai-400020

..... अपीलार्थी/Appellant

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..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Sh. Percy Pardiwala,Sr.Advocate with
Sh. HitenChande
प्रतिवादी द्वारा/Respondent by : S/Sh. Vijay Kumar-CIT-DR and
Tejinder Pal Singh.

सुनवाई की तिथि/ Date of hearing : 01/04/2022
घोषणा की तिथि/ Date of pronouncement : 27/06/2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

1. These appeals by the assessee for AY 2008-09 and 2009-10 and cross appeal by the Revenue for AY 2009-10 involve similar issues, therefore, these appeals are taken up together and are decided by this common order.

ITA No. 7721/Mum/2012 – (AY 2008-09)

2. This appeal by the assessee is directed against the assessment order dated 31.10.2012 passed under section 143(3) read with section 144C of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

3. The assessee is a subsidiary of Multi Screen Media, Singapore Pte. Ltd. The assessee is engaged in the business of production/acquisition and sale of television programmes, marketing of air time slots of Television channels to Indian advertisers and distribution of satellite channels. During the period relevant to Assessment Year (AY) under appeal, the assessee entered into transactions with its holding company. The Transfer Pricing Officer (TPO) after analyzing international transactions vide order dated 31.10.2011 made adjustment of Rs. 47,47,37,934/- with respect to notional interest on outstanding receivables from its Associated Enterprises (AE). Apart from

above, the Assessing Officer (AO) in draft assessment order dated 27.12.2011 made disallowance of advertisements and sales promotion expenses Rs. 61,73,45,429/- and addition on account of unaccounted receipts Rs. 3,14,069/-. The assessee filed objections before the Dispute Resolution Panel (DRP) against the adjustments/additions made by TPO and the AO. The DRP vide direction dated 25.09.2012 in principle upheld the adjustment but directed the AO to recompute by charging interest adding markup of 3% on assessee's domestic cost of borrowings. Resultantly, the adjustment was reduced to Rs. 19,71,03,811/-. The AO vide impugned order made addition of the aforesaid adjustments and disallowances. Hence, the present appeal.

4. The ground no.1 of appeal is general in nature, hence, require no separate adjudication.
5. The ground no.2 of appeal by the assessee is as under:

"Disallowance of Advertisement and Sales promotion Expenses of Rs. 61,345,429

2. On the facts and circumstances of the case and in law, the learned AO, based on the directions of the DRP, erred in disallowing 81.25% of total expenditures on advertisement and sales promotion expenses amounting to Rs 61,73,45,428 (81.25% of 759,809,758) under section 37(1) of the Act."

6. Sh. Percy Pardiwala appearing on behalf of the assessee submitted that the assessee is an agent of its holding company for procuring advertisement, the assessee incurred expenditure to the tune of Rs. 75,98,09,758/- towards advertisement and sales promotion expenses. The AO following its own order for A.Y. 2005-06 disallowed 81.25% of advertisement and sales promotion expenditure. The Id. Counsel for the assessee pointed that similar disallowance was made in A.Y. 2010-11. In A.Y. 2005-06, the assessee carried the issue in

appeal before the Tribunal in ITA No. 4686/Mum/2010. The Tribunal vide order dated 20.03.2013 following the order of Hon'ble Bombay High Court in the case of Star India Pvt. Ltd. in Income Tax Appeal No. 165 of 2009 decided on 24.03.2009 deleted the addition. This fact was brought to the notice of the AO, however the AO rejected the contentions of the assessee on the ground that the Department has filed SLP before the Hon'ble Supreme Court of India against the order of Hon'ble High Court in the case of Star India Pvt. Ltd. (supra). The Id. Counsel pointed that now the Hon'ble Supreme Court of India has dismissed the SLP of the Department i.e. SLP No. 14850/2010 vide order dated 16.02.2022. The Id. Counsel further submitted that the Tribunal dismissed the appeal of the Department for AY 2010-11 in ITA No. 1237/Mum/2016 vide order dated 24.08.2021 on the same issue following the order of Hon'ble Bombay High Court in the case of Star India Pvt. Ltd. (supra). The Id. Counsel further pointed that the Revenue filed appeal against the order of Tribunal in assessee's own case for A.Y. 2005-06 before the Hon'ble Bombay High Court in Income Tax Appeal No. 2057 of 2013. The Hon'ble Bombay High Court vide order dated 16.11.2015 dismissed the appeal of Department following the ratio laid down in the case of Star India Pvt. Ltd. (supra).

7. Per contra, Sh. Vijay Kumar representing the Department vehemently defended the impugned order. However, the Id. Departmental Representative (DR) fairly admitted that similar issue was considered by the Tribunal in assessee's own case in AY 2005-06.

8. Both sides heard. We find that the issue raised in ground no.2 of the appeal i.e. disallowance of advertisement and sales promotion expenses is recurring in nature. The Revenue had made disallowance of advertisement and

sales promotion expenses in AY 2005-06. The AO while passing the impugned assessment order followed the same analogy for making disallowance in AY 2008-09. The AO apportioned the advertisement and sales promotion expenditure between AE and the assessee in the ratio of 81.25% and 18.75% and thus disallowed expenditure to the tune of Rs. 61,73,45,429/- being 81.25% of the total expenses claimed under section 37(1) of the Act. The co-ordinate bench while adjudicating this issue in appeal of the assessee in ITA No. 4686/Mum/2010 (supra) concluded as under:

*“10. On observation of all the above five objections raised by the CIT(A) in his order, in our view, do not spell that the line of business of the assessee in case of Star, are separate and distinct. The activities are similar, therefore, in our considered view, the decision in the case of Star India Pvt.Ltd (supra), is squarely applicable on the facts of the present case. We further noted that in past even in the case of the assessee itself, the issue has been decided in favour of the assessee. In this year, perhaps for the reason that there is a divergent view between the member of the Tribunal in case of Star India Pvt. Ltd., therefore, for this reason, the issue was not decided and it was pending. However, for the earlier year, the Tribunal has decided the issue in favour of the assessee. Copies of the order of assessment years 2000-01 & 2001-02 are placed on record. Even we further noticed that in case of other assessee i.e. in the case of **NGC Network (India) P. Ltd., decided in ITA NO.635/Mum/2010 and in the case of Viacom 18 Media Pvt. Ltd., decided in ITA No.5057/Mum/2007**, similar facts were involved and the issue has been decided by the Tribunal in favour of these assessees.”*

9. The aforesaid decision of the Tribunal was upheld by the Hon’ble Jurisdictional High Court in an appeal filed by the Revenue in Income Tax Appeal No. 2057 of 2013 (supra). Even in the subsequent AYs, the Tribunal has been consistently allowing assessee’s claim in entirety in respect of advertisement and sales promotion expenses following the ratio laid down in the case of Star India Pvt. Ltd. (supra). Recently the Hon’ble Apex Court has

dismissed SLP No. 14850 of 2010 by the Department challenging the order of Hon'ble High Court in the case of Star India Pvt. Ltd. Now, the issue has attained finality in favour of assessee. In the light of aforesaid decisions, the assessee succeeds on ground no.2 of the appeal.

10. The next issue in the appeal by the assessee is with regard to levy of notional interest on outstanding receivables from its AE. The grounds raised by the assessee assailing Transfer Pricing Adjustment on the issue are as under:

"Transfer Pricing Adjustment on Account of Levy of Notional Interest on Outstanding Receivables from its Associated Enterprise

3. *On the facts and in the circumstances of the case, the learned AO, based on the directions of the DRP, erred in making a transfer pricing adjustment and thereby making an addition of Rs 19,71,02,811 to the income of the Appellant, by imputing notional interest on outstanding receivables from its associated enterprise, MSM Satellite (Singapore) Pte. Ltd.(MSMS).*

4. *On the facts and in the circumstances of the case, the learned AO, based on the directions of the DRP, erred in not issuing a show cause notice to the Appellant and thereby not granting an opportunity to the Appellant to provide an explanation as to why interest on the outstanding receivables from MSMS should not be imputed as income in its hands.*

5. *On the facts and in the circumstances of the case, the learned AO, based on the directions of the DRP erred in not appreciating that the interest cost has already been factored in the higher margin earned by the Appellant vis-à-vis the comparable companies in the sale of content segment.*

6. *On the facts and in the circumstances of the case, the learned AO, based on the directions of the DRP, erred in not appreciating the fact that the extension of credit facility is closely and inextricably linked to the sale of content transaction, which is demonstrated by a working capital adjustment and thus the same should not be treated as a separate international transaction under Section 92B(1) of the Act.*

7. *On the facts and in the circumstances of the case in law, the learned AO, based on the directions of the Hon'ble DRP, erred in computing interest on*

average receivables without appreciating the fact that interest should be levied proportionately based on actual member of days for each invoice relating to the receivables from MSMS have been outstanding during FY 2007-08

8. On the facts and in the circumstances of the case, the learned AO, based on the directions of the DRP, erred in including the processing fees relating to the borrowings as part of the cost of borrowing while imputing interest in the hands of Appellant.

9. On the facts and in the circumstances of the case, the learned AO, based on the directions of the DRP, erred in levying a mark-up of 3% in an arbitrary manner and thus the same should be deleted.”

11. The Id. Counsel for the assessee submitted that the TPO has erred in holding that the credit facility provided by the assessee to its AE is similar to the facility of extending working capital loan without charging any interest. The Id. Counsel pointed that the DRP in para 4.3 of direction has erred in recording the fact that the assessee allows 75 days credit to 3rd parties, whereas the correct position is that the assessee gets 75 days credit period from the 3rd parties. The Id. Counsel raised multiple contentions against the Transfer Pricing adjustment made in respect of notional interest on outstanding receivables. He submitted that the assessee has entered into an agreement with its AE for sale of contents. The said agreement is at page 257 to 269 of the Paper Book. As per the agreement, there is no condition for interest to be charged on delayed payment of invoices. The assessee and the AE have mutually agreed on a credit period of 360 days for sale of content which is evident from the sample invoices raised by the assessee on AE. The sample invoices are at pages 303 to 308 of the Paper Book. The assessee has benchmarked the transaction of sale of content by applying Transaction Net Margin Method (TNMM) as the most appropriate method and using OP/OR as Profit Level Indicator (PLI). The above transaction should be accepted at Arm's Length since Net Margin of the

Content Segment is higher than the margin earned by comparables i.e. 1.89% as against margin of assessee at 3.43%. The Id. Counsel referred to the computation of margins of the assessee at page179 of the Legal Paper Book.

11.1 The next contention of Id. counsel for the assessee is that the alleged delay in receiving the sale consideration would not give rise to any international transaction. The Id. counsel asserted that the sales consideration against the invoices raised by the assessee were cleared within the credit period of 360 days as mutually agreed by the assessee & AE. Since, there is no delay in receiving the payments against the invoices, there is no international transaction on account of alleged delay in receivables. The international transaction is that of the sale of the content in terms of the conditions specified in the agreement and modified by invoices raised. The delay in receivables would arise only when the payment is made beyond the agreed period of 360 days. The Id. Counsel further asserted that the delay in receiving consideration does not fall within the ambit of lending or borrowing of money as provided under section 92B(1) of the Act. To support this contention reliance was placed on the decision in the case of Bombay Steam Navigation Co. Pvt. Ltd. Vs. CIT, 56 ITR 52 (SC).

11.2 The Id. Counsel further argued that even if the alleged delay in payments by AE is accepted and the said transaction is held to be an international transaction, no adjustment is required as the transaction is already at Arm's length. The Id. Counsel submitted that the average margins of the comparables is 1.89% as against the operating margin of assessee at 3.43%. If the transaction is benchmarked separately applying CUP, the margins of the assessee would go

up to 7.63% i.e. four times the margin of the comparables. The result of applying CUP as proposed by the TPO and the DRP would give absurd results.

11.3 The Id. Counsel contended that providing credit period is a condition of sale and is not an independent transaction. Explanation (c) to Section 92B does not provide for splitting of transaction of sale into (a) transaction of sale and (b) providing credit period of sale. The Id. Counsel further submitted that the sale price charged by the Appellant to its AE factors the impact of credit period of 360 days provided to the AE. Therefore, even if credit period is considered to be a separate international transaction, it must be combined with the transaction of sale and benchmarked applying TNMM as the price for the credit period provided to its AE has been considered in the sale price.

11.4 The Id. Counsel contended that if the net margin earned by the assessee is adjusted for working capital adjustment then also the net margin earned by the assessee is higher than the net margin earned by the comparables. The working capital adjustment factors the credit period of 360 days provided to the AE. In support of his submissions, the Id. Counsel placed reliance on the decision in the case of PCIT vs. Kusum Healthcare Pvt. Ltd. reported as 398 ITR 66 (Delhi).

11.5 The Id. Counsel made an alternate submission without prejudice to his primary contention on the issue, that if at all notional interest is to be added on over dues receivable, it should be benchmarked at LIBOR +200 base points or at the AE's cost of borrowing at 4.2947%.

12. Per contra, the Id. DR vehemently defended the assessment order.

13. We have heard the submissions made by rival sides on this issue of notional interest on alleged delay in payment of outstanding receivables from the AE. The first contention of the Revenue is that the assessee has granted 75 days credit period to the 3rd parties as against the 360 days credit to AE. The Id. counsel for the assessee has submitted that this observation by the DRP is contrary to the facts, in fact 75 days credit has been allowed to the assessee by the 3rd parties. As regards allowing of 360 days credit to the AE, our attention has been drawn to the Service Agreement between the assessee and the AE at page 257 of the Paper Book. It has been contended that there is no clause in the said agreement for charging of interest in case of delayed payments. There is no clause in the agreement specifying the time period within which the payment is to be made. The period within which payment is to be made is specified in the invoices, some of the samples invoices are available at page 303 to 308 of the Paper Book. A perusal of sample invoice reveals that the payment is to be made within 360 days from the date of the shipment. Except from the invoices, there is no other document before us indicating the time period for making the payment. The Id. Counsel for the assessee made a statement that all payments have been made by the AE within the time specified in the invoices.

14. The assessee has benchmarked the transaction of content sale and rendering incidental services by applying TNMM as the most appropriate method. The benchmarking of the said transactions and the comparables selected by the assessee have been accepted by the TPO. The transaction of providing credit period on sale is an integrated part of the transaction of sale. Charging notional interest on overdue payments springs from the transaction

of sale. The average margin of the assessee is 3.43% as against the average margin of the comparables at 1.89%. Thus, the international transaction of purchase of audio visual software and rendering incidental services is at Arm's Length. The TPO has made adjustment in respect of notional interest on alleged delayed receivables by applying CUP. With the adjustment proposed by the TPO, margins of the assessee rises to 7.63% vis-a-vis margins of comparable at 1.89%. The assessee has furnished computation of operating margin of the appellant/assessee if notional interest is separately recovered as under:

Particulars	Reference	Amount (in Rs.)	Page Reference
Operating revenue (ÓR')	A	4,33,37,79,173	Page 244 of Paper book II
Operating profit (OP)	B	14,84,44,831	Page 244 of Paper book II
Operating margin of the Assessee (OP/OR)	C=B/A	3.43%	
Adjustment on account of notional interest on overdue receivables	D	19,71,2,811	As per final assessment order
Revised OR	E=A+D	4,53,08,81,984	
Revised OP	F=B+D	34,55,57,642	
Revised operating margin of the Assessee (Revised OP/OR)	G=F/E	7.63%	
Arm's length operating margin earned by comparables	G	1.89%	Page 254 of Paper book II

15. The Hon'ble Delhi High Court in the case of PCIT vs. Kusum Healthcare Pvt Ltd held that where it is proved that the operating margin earned from international transaction with AE is higher than the comparables, transfer pricing adjustment for overdue interest is unwarranted. In the instant case, it can be seen from the comparative table that the transaction between the assessee and AE is already at Arm's Length, the adjustment made in respect of notional interest gives absurd results to un-realistic margins.

16. Thus, in the facts of the case and the aforesaid decision, we hold that adjustment of notional interest on alleged delayed payment of receivables is liable to be deleted. As a result, ground nos. 3 to 9 of the appeal are allowed.

17. In ground no. 10 of appeal, the assessee has assailed addition on account of unaccounted receipts of Rs. 3,14,069/-. The Id. Counsel submitted that the AO has made addition in respect of the receipts reflected in Form 26AS. An amount of Rs. 2,04,000/- has been shown as receipts from Nalin Ganesh Shastri and Rs. 1,10,069/- from Ramsey Pharma Pvt. Ltd., the assessee has not carried out any transaction with the above mentioned parties. The amounts reflected in Form 26AS in respect of alleged transactions with the said parties does not belong to the assessee. The assessee has not claimed credit of TDS against the alleged payments received from the two parties. The Id. Counsel pointed that the assessee had written letters to the aforesaid parties, the same are at page no. 270 and 274 of the Paper Book, but no response was received from either of the parties. The Id. Counsel submitted that addition cannot be made merely on the basis of information contained in Form 26AS. In support of his contention reliance is placed on following decisions:

- (i) A.F. Ferguson & Co. Vs. JCIT in ITA No. 5037/Mum/2012 and
- (ii) S.Ganesh Vs. ACIT in ITA No. 527/Mum/2010 upheld by Hon'ble Bombay High Court in Income Tax Appeal No. 1930 of 2011.

18. Per contra, Id. DR submitted that this issue can be restored back to the file of AO for re-examination.

19. Both sides heard. The addition of Rs. 3,14,069/- has been made by AO on the basis of TDS reflected in Form 26AS, the contention of assessee is that

the assessee had no transaction with Nalin Ganesh Shastri & Ramsey Pharma Pvt. Ltd. (supra) during the period relevant to the AY under appeal, hence, the amount reflected in Form 26AS against the names of aforesaid parties does not belong to the assessee nor the assessee has claimed credit of TDS in respect of the payments received from the aforesaid parties. The assessee in order to show his bonafide has also drawn our attention to the letters written to the aforesaid parties. However, no response is stated to have been received by the assessee from the aforesaid parties. It is trite law that addition cannot be made merely on the basis of information contained in Form 26AS, therefore, we deem it appropriate to restore this issue back to the file of AO for the limited purpose of verification as to whether the assessee has claimed credit of TDS from the aforesaid two parties, if answer to the above query is in negative, addition be deleted. Ground no. 10 of appeal is thus allowed for statistical purpose.

20. The assessee has raised additional ground no. 11 of the appeal on the issue of T.P. Adjustment of notional interest of outstanding receivables. This ground of appeal has been dealt with while deciding ground no. 3 to 9 of the appeal, hence, not decided separately.

21. The Id. counsel for the assessee submitted that he is not pressing additional ground of appeal no. 12 & 13, therefore, the said grounds are dismissed as not pressed.

22. In the result, appeal of the assessee is partly allowed in the terms aforesaid.

ITA No. 1429/Mum/2014 (AY-2009-10) by Assessee
ITA No. 1178/Mum/2014 (AY-2009-10) by Revenue

22. Both sides are unanimous in stating that the facts germane to the issues raised in the appeal for AY 2009-10 are identical to the issues raised in AY 2008-09, therefore, the arguments made in the appeal for AY 2008-09 would apply to the AY 2009-10. We find that the grounds and the issues raised by the assessee in appeal for AY 2009-10 are identical to the grounds raised in the appeal for AY 2008-09. The Revenue in its appeal has assailed the findings of DRP in directing the AO to adopt mark-up of 3% in respect of notional interest on receivables.

23. The ground No. 1 of the appeal is general in nature, hence require no adjudication.

24. In ground no. 2 of appeal the assessee has assailed disallowance of Advertisement and sales promotion expenses. The facts germane to the issue are identical to ground No.2 in the appeal for AY 2008-09. For parity of reasons, ground no.2 of the appeal is allowed.

25. In ground of appeal no. 3 to 7 the assessee has assailed TPO adjustment in respect of notional interest on outstanding receivable AE. The assessee has furnished chart for AY 2009-10 as well to show that if notional interest is added, the revised margin of assessee would be almost 10 times the margin of comparables. The table showing margin of the assessee, operating margin of the comparables and revised margin after considering notional interest on overdue receivables is as under:

Particulars	Reference	Amount (in Rs.)	Page Reference
Operating revenue (ÓR')	A	6,20,56,21,433	Page 244 of Paper book II
Operating profit (OP)	B	56,78,59,874	Page 244 of Paper book II
Operating margin of the Assessee (OP/OR)	C=B/A	9.15%	
Adjustment on account of notional interest on overdue receivables	D	23,64,76,911	As per final assessment order
Revised OR	E=A+D	6,44,20,98344	
Revised OP	F=B+D	80,43,36,785	
Revised operating margin of the Assessee (Revised OP/OR)	G=F/E	12.49%	
Arm's length operating margin earned by comparables	G	1.21%	Page 254 of Paper book II

Since, we have deleted the adjustment in respect of notional interest in AY 2008-09, the said findings would *mutatis mutandis* apply to the AY 2009-10 as well. Consequently, the ground raised in the appeal by the Revenue is dismissed and ground no. 3 to 7 in the appeal of assessee are allowed.

23. In the result, appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open court on Monday , the 27th day of June, 2022.

Sd/-
(M. BALAGANESH)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 27/06/2022

S.K., Sr. PS

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai