

आयकर अपीलीय अधिकरण
मंबईपीठ "जे"
श्री विकास अवस्थी. न्यायिकस दस्यएवं
श्री गगन गोयल, लेखाकार सदस्यके समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "J", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
आअसं. 1898/मुं/2015 (नि.व. 2010-11)
ITA NO.1898/MUM/2015(A.Y.2010-11)

M/s. Swiss Re Services India P. Ltd.
Unit 701-702, Peninsula Corporate Park
Tower A, Ganpatrao Kadam Marg
Lower Parel, Mumbai 400013

PAN: AAHCS5626E

..... अपीलार्थी/Appellant

बनाम Vs.

DCIT, Circle 2(3)(2)
Room No. 552, Aayakar Bhavan
M K Marg, Mumbai 400020

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Nishant Thakkar, Adv&
Shri Hiten Chande, Adv

प्रतिवादी द्वारा/Respondent by : Shri Akhtar Ansari, Sr. AR

सुनवाई की तिथि/ Date of hearing : 29.09.2022

घोषणा की तिथि/ Date of pronouncement : 26.12.2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the assessment order dated 21.01.2015 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 [in short 'the Act'], for the Assessment Year 2010-11.

2. This appeal is in second round before the Tribunal. The appeal was decided by the Tribunal vide order dated 06.01.2020. Thereafter, the assessee

filed miscellaneous application MA No. 93/Mum/2021 seeking rectification of mistake in not adjudicating ground No. 1.4 of Revised grounds of appeal. The Tribunal vide order dated 24.09.2021 allowed the aforesaid miscellaneous application and recalled the order dated 06.01.2020 for the limited purpose of adjudicating ground No. 1.4 in the Revised grounds of Appeal. The relevant extract of the order in MA No. 93/Mum/2021 is reproduced below: -

“8. Upon careful consideration we note that in the aforesaid ITAT order this issue has not been specifically adjudicated. To this extent there is a mistake apparent from record. Hence, in the interest of justice, we recall the aforesaid ITAT order for adjudication of ground No. 1.4 in the revised grounds of appeal.”

3. The solitary ground now before us for adjudication reads as under: -

“1.4 The learned Assessing Officer/TPO under the directions of the Hon'ble DRP erred on facts and in law in incorrectly computing the margin of the Appellant by excluding income such as reversal of provision of doubtful debts which is in the nature of operating income from margin computation.”

4. Shri Nishant Thakkar, appearing on behalf of the assessee submits that the TPO has incorrectly computed the margin of the assessee by excluding the amount of provision of doubtful debts by treating them as non-operating in nature. The bad debts were recovered from associated enterprises in the period, therefore, they had to be written back. They are operating in nature. The Id. AR asserted that the issue raised in ground No. 1.4 is squarely covered by the decision of the Hon'ble Bombay High Court in the case of PCIT vs. Petro Araldite (P.) Ltd. (2018) 96 taxmann.com 385 (Bom) and the decision of the Pune Bench of Tribunal in the case of Suessen Asia (P.) Ltd. vs. ACIT (2018) 90 taxmann.com 52 (Pune-Trib).

5. On the other hand Shri Akthar Ansar, representing the Department vehemently defended the impugned order. The Ld. DR submits that the bad

debts in earlier assessment years were realized in the current assessment year. Since this income pertains to previous assessment years, therefore it is not part of operational income. The Ld. DR further submits that it is not ascertained as to whether the transactions relate to the AE or non-AE.

6. We heard the submission made by the rival sides. A perusal of the DRP directions and the assessment order reveals that the assessee has claimed certain incomes, viz. interest on deposit, rental income, profit on sale of assets, revision of provision for doubtful debts and write back of liabilities as operating income. The DRP held that these incomes are excluded by the TPO as these incomes are not operating in nature. The DRP directed the Assessing Officer that in the event there are similar items in any of the comparables considered, the TPO is directed to exclude such income from operating income of the comparables to maintain consistency. The TPO followed the directions of the DRP. The assessee before us has placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of Petro Araldite (P.) Ltd. (supra). One of the question before the Hon'ble High Court in the aforesaid case was: -

“(c) Whether on the facts and circumstances of the case and in law, the Tribunal erred in directing that the provisions pertaining to earlier year but written back during the current year be treated as operational income of the current year without appreciating that the benchmarking process for transfer pricing purposes has to be based only on current year’s operational profits?”

7. The Hon'ble High Court answered the question by observing as under: -

“Re Question (c): -

(i) The impugned order of the Tribunal has upheld the order of the DRP that the provisions pertaining to the earlier years written back in the subject Assessment Year would be in the nature of operating income. Thus, not excludeable while determining the operating profits. The impugned order of the Tribunal placed reliance upon the orders of is

Co-ordinate Bench in Income Tax Appeal Nos. 2414/M.2013 in the case of Asst. CIT v. Zee Entertainment Enterprises (P.) Ltd. (2014) 51 taxmann.com 231 (Mum.-Trib.) – wherein it was held that provisions of writing back were to be considered as operating revenue, if a uniform approach is adopted unless of course, any contrary material is brought on record.

- (ii) The aforesaid decision of the Tribunal in Zee entertainment Enterprises (P.) Ltd's case (supra) was appealed to this Court being Income Tax Appeal No. 205 of 2015 – (CIT v. Zee Entertainment Enterprises (P.) Ltd.). Moreover, it appears that the aforesaid issue has not been appealed to this Court by the Revenue. In any case, above Appeal of the Revenue has not been admitted on this issue.*
- (iii) Moreover, the Revenue has not even made any attempt to point out why the reasoning of the Tribunal in Zee Entertainment Enterprises (P.) Ltd's case (supra) was incorrect or that it was not applicable to the present facts.*
- (iv) In view of the above, the question as framed does not give rise to any substantial question of law. Thus not entertained.”*

8. Similar issue had come up before the Pune Bench of Tribunal in the case of Sussen Asia (P.) Ltd. (supra). The Tribunal decided the issue as under: -

“8. Before us, it is assessee's submission that the amount has been written back in the ordinary course of business on the basis of waiver letters received during the year consideration. The only reason for disallowing the same by the Revenue is that the Revenue is of the view that the amounts written back cannot be considered as operating income as according to it the amount written back is a mere book entry and is not connected with business operations of the assessee. On the issue of the amounts written back as being operating income, we find that identical issue arose before the Co-ordinate Bench of the Tribunal, Delhi in the case of Sony India (P.) Limited (supra) and the Co-ordinate Bench of the Tribunal of Delhi decided the issue in favour of the assessee by observing as under :

'106.1 The first of these items is, provision written back amounting to Rs.57,02,000. For exclusion of above item and for balances written back interest received from customers and other miscellaneous revenue receipts, the learned CIT (A) gave the following consolidated reasons :

"(A) I find that interest received is a financial income and as such cannot be considered as operational receipts.

*(B) The items which have been written back as mentioned in sub-
paras (i) and (ii) of this para, are nothing but merely accounting entries
and are not connected to the operations of the appellant.*

.....

On merit we see no good reason to exclude provisions written back as not forming part of computing operating profit of the taxpayer. In our considered, exclusion of above provision is based upon misconception of real nature of the entry generating Income. It is not practically possible for a businessman to actually disburse all expenses incurred by it in the financial year and, therefore, a large number of business liabilities (manufacturing included) are provided in the accounts of a given year. It is elementary that there is no difference between actual disbursement of an expenditure or provision thereof. However, recovery of liability provided may become barred by limitation or for some other reasons, liability gets unenforceable or is reduced or ceases to exist with the passage of time. Therefore, it may be necessary to write back such a liability. But, it cannot follow that the liability was not expenditure of business or operating expense. Cessation of a liability is a taxable income under Sec.41 of the IT Act. The underlying principle behind above provision is that Revenue takes back a benefit which it granted earlier, but which, due to subsequent events or changed circumstances should be charged to tax as "income". Statutory provision overrides general understanding that mere creation of a benefit to a taxpayer by admission or cessation of a debt or a liability should not result in an income. Thus, creation of unpaid liability and its write back is a normal incident of a business operation which is carried everywhere in accounts to have true picture of profits of the relevant period. If a liability has ceased to exist and is required to be accounted for and shown as income by the taxpayer and, in case it is not so shown the taxpayer can be subjected to a penal action under Indian regulations. In this connection, we can refer to decision of the Supreme Court in the case of CIT v. S. Teja Sinsh (1959) 35 ITR 408 (SC). Having regard to statutory provisions, it cannot be said that provision or writing back of liability is not part of operating profit or would not be taken into consideration for computing the same. The aspect of liabilities written off was ignored without considering nature and character of such liabilities. It would have been different if a finding was recorded that provision written back did not relate to business operations of the taxpayer. There is no suggestion on the above lines. Further, it is not the case of the Revenue that liabilities written back

were wrongly provided for. It is a settled and well accepted proposition that adjustment can be made only on account of differences. It is not possible to believe that other comparable entities taken into consideration are not making and writing back provision of liabilities no more required. There is no material nor there any finding to support action of the Revenue authorities. We can therefore make a general observation that all business enterprises are making and writing back liabilities as a normal incident of operating business. The expenses for which provisions were originally made were considered operating in nature and allowed in assessment. These provisions no longer required by the taxpayer during the year under review were reversed in the books of account as per mercantile system of accounting and shown as income. Therefore, on facts we do not see any justification for excluding provisions written back in the P & L a/c as not forming part of the operating profit of the taxpayer. Accordingly, claim of the taxpayer is accepted."

9. *We further find that against the order of the Tribunal, the matter was carried by the Revenue before Hon'ble Delhi High Court but no ground with respect to the treatment of liabilities written back as being operating or non-operating income was raised by Revenue before Hon'ble Delhi High Court meaning thereby that the decision of Delhi Tribunal was accepted by the Revenue. We further find that in the case of Gillete Diversified Operations (P.) Ltd. (supra), the Co-ordinate Bench of the Tribunal, Delhi had decided the issue in favour of the assessee and held that if the reversal of provision / write back is on account of revenue in nature, it should be included as part of operating income and if the liabilities originally created were on account of capital items then their write back cannot be considered to be a normal instances of business and hence to be excluded as operating income. The aforesaid order of the Tribunal has also been accepted by the Revenue as no appeal on the issue that whether write back is to be excluded for working out the operating profits has been preferred by the Revenue before the Hon'ble Delhi High Court meaning hereby that the issue of write back is to be considered as part of operating income has attained finality. Before us, Revenue has also not placed any contrary binding decision in its support. We therefore by placing reliance on the aforesaid decisions of the Co-ordinate Bench of the Tribunal, Delhi in the case of Sony India (P.) Ltd. (supra) hold that the amount of write back of Rs.37.49 crores which is on account of amounts written back of expenses / liabilities is to be considered as part of operating income.*

Before us, assessee also submitted that if the write back amount of Rs.37.49 crores is included as operating income, the operating margin would works out to 42.94% as against the operating margin of 14.36% of the comparable companies and therefore the transactions of the assessee with it's A.E's would be at arms length requiring no adjustment to the income. We find that on this issue there is no finding of TPO. We therefore for the limited purpose of verifying the aforesaid contention of assessee remit the issue to the file, of TPO. If the contention of the assessee that the operating margin is comparable with that of comparable companies is found correct, no adjustment to ALP transaction is required. Since this ground has been decided in favour of the assessee and in view of the Ld. A.R.'s submission, the other grounds of the assessee on TP issues are rendered academic and therefore require no adjudication. Thus, theground of the assessee is allowed for statistical purposes.”

9. No contrary decision/material has been placed before us by the Revenue. Thus, in the light of the aforesaid decision we hold that the provision of doubtful debts written back in the Profit & Loss Account are part of the operating income. Consequently ground No. 1.4 of the revised ground of appeal is allowed for statistical purposes in the terms aforesaid.

10. In the result, appeal by the assessee is allowed protanto.

Order pronounced in the open court on Monday the 26th day of December, 2022

Sd/-

(GAGAN GOYAL)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 26/12/2022
n.p.

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)/
Sr.Private SecretaryITAT, Mumbai