

IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI

SHRI AMARJIT SINGH, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 461/MUM/2016
(Assessment Year: 2011-12)

Infinity Retail Limited
[Formerly known as Infinity Wholesale
Ltd. which is now merged with Infinity –
Retail Ltd.],
Unit No. 701 & 702, 7th Floor,
Kaledonia, Sahar Road, Andheri (East),
Mumbai - 400069
[PAN: AAACW6273C)

..... Appellant

The Income Tax Officer – 11(3)(4),
Aayakar Bhavan, 429, 4th Floor,
M.K. Road, Mumbai - 400020
Range-8(3), Mumbai,

Vs

..... Respondent

Appearances

For the Appellant/Assessee : Shri Nitesh Joshi
For the Respondent/Department : Ms. Samruddhi Hande

Date of conclusion of hearing : 16.09.2022
Date of pronouncement of order : 30.11.2022

ORDER

Per Rahul Chaudhary, Judicial Member:

1. The present appeal is directed against Final Assessment Order dated, 30.11.2015, passed under Section 143(3) read with Section 144C(13) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] as per directions issued by Dispute Resolution Panel-II, Mumbai (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act pertaining to the Assessment Year 2011-12.
2. The Appellant has raised the following grounds of appeal:

Transfer Pricing Grounds

1. *That on the facts and circumstances of the case and in law the Learned Assessing Officer/ Transfer Pricing Officer/ ("Ld. AO/ TPO") erred in proposing and the Hon'ble Dispute Resolution Panel ("DRP") further erred in upholding the transfer pricing adjustment of Rs.5,899,019 pertaining to reimbursement of out of pocket expenses and reimbursement of software maintenance expenses to its Associated Enterprise ("AE"), alleging the same is not at arm's length in terms of the provisions of Sections 92C(1) and 92C(2) of the Income-tax Act, 1961 ("Act") read with Rule 10D of the Income-tax Rules, 1962 ("the Rules").*
2. *That on the facts and circumstances of the case and in law the Ld. AO/ TPO/ DRP grossly erred in ignoring the facts and materiality of third party invoices submitted to the Ld. AO TPO and in adjusting an amount of Rs.2,867,592 towards reimbursement of out of pocket expenses to its AE.*
3. *That on the facts and circumstances of the case and in law the Ld. AO/ TPO/ DRP erred in not considering the evidence and submissions made by the Appellant in a correct perspective and in adjusting an amount of Rs.3,031,427 towards reimbursement of software maintenance expenses.*
4. *That on the facts and circumstances of the case and in law the Ld. AO/ TPO/ DRP erred in not considering the principle of res judicata as reimbursement of software maintenance expenses was accepted at arm's length in the assessment year ("AY") 2008-09 and AY 2009-10.*
5. *That on the facts and circumstances of the case and in law the Ld. AO erred in initiating penalty proceedings under Section 271(1)(c) read with Explanation 7 of the Act.*

Corporate Tax Grounds

6. *Disallowance of lease rental*
 - a. *Based on the facts and circumstances of the case and in law, the Ld. AO, relying on the directions of the DRP, erred in not*

allowing lease rent payments of Rs.50,43,085 on the ground that the same was capital expenditure.

- b. Without prejudice to the above, the learned AO erred in not allowing depreciation on the principal payment of lease rental treated as capital in nature*
- 7. Based on the facts and circumstances of the case and in law, the learned AO erred in not allowing set-off of brought forward business loss/unabsorbed depreciation of Rs. 4,36,28,522, while computing tax on book profits under the provisions of Section 115JB of the Act.*
- 8. Based on the facts and circumstances of the case and in law, the learned AO erred in levying interest under Section 234B of the Act of Rs. 29,51,816.*
- 9. Based on the facts and circumstances of the case and in law, the learned AO erred in levying interest under Section 234D of the Act of Rs. 865,053.*

Each of the above grounds is independent and without prejudice to the other grounds of appeal preferred by the appellant.”

- 3. The relevant facts in brief are that the Appellant is a company engaged in the business of wholesale trading (cash and carry) of consumer electronics and appliances.
- 4. The Appellant filed its return of income on 29.11.2011 declaring 'Nil' income after claiming set-off for carried forward losses. The case of the Appellant was selected for scrutiny. During the assessment proceedings, the Assessing Officer noted that the Appellant has entered into international transactions with its Associated Enterprises (AEs) and therefore, a reference was made under Section 92CA(1) to the Transfer Pricing Officer (TPO) for the determination of Arm's Length Price (ALP) of the international transactions. The TPO,

vide order, dated 23.01.2015 passed under Section 92CA(3) of the Act, proposed transfer pricing adjustment of INR 58,99,019/- including the following two transfer pricing adjustments:

Sr. No.	Particulars	Amount (INR)
1	Reimbursement of Out of Pocket Expenses to AE [For non-submission of third party invoices] pertaining to travel, accommodation, freight etc. incurred by Woolworths Limited, Australia on behalf of the Appellant]	28,67,592/-
2	Reimbursement of IT Connectivity Charges/ Software Maintenance Charges to Woolworths Limited [Lack of supporting third party invoice /documents]	30,31,427/-
Total		58,99,019/-

5. In addition to the above transfer pricing adjustments, in the Draft Assessment Order, dated 23.02.2015 the Assessing Officer also proposed corporate tax disallowances of INR.50,43,085/- being lease rental payments made during the relevant previous year, and the software maintenance expenses of INR 97,89,384/-. The Appellant filed objections to the Draft Assessment Order, dated 23.02.2015, in relation to the aforesaid proposed additions before DRP which were rejected by the DRP, vide order dated 22.10.2015. The Assessing Officer passed the Final Assessment Order, dated 30.11.2015, on the basis of the aforesaid order/directions of DRP making the disallowances/additions:

- (a) Addition of INR 58,99,019/- on account of Transfer Pricing Adjustment
- (b) Disallowance of deduction of lease rentals amounting to INR 50,43,085/-

(c) Disallowance of deduction of software maintenance expenses of INR 97,89,384/

6. Being aggrieved, the Appellant is in appeal before us challenging the Final Assessment Order, dated 30.11.2015, on the grounds reproduced in paragraph 2 above which are taken up in seriatim hereinafter.

Ground No. 1

7. Ground No. 1 is general in nature and therefore, does not require adjudication.

Ground No. 2

8. Ground No. 2 is directed against the transfer pricing adjustment of INR 28,67,592/- pertaining to reimbursement of the out of pocket expenses.

9. The relevant facts for the adjudication of the issue, in brief, are that the Appellant had claimed deduction for payments of INR 1,32,81,256/- made by the Appellant to its AEs contending the same to be reimbursement of out of pocket expenses incurred by the AEs on behalf of the Appellant. The Appellant submitted third-party invoices for INR 1,04,13,664/-. The TPO, after granting benefit in respect of the same, proposed transfer pricing adjustment of INR 28,67,592/- taking ALP of the balance out-of-pocket expenses of INR 28,67,592/- as 'Nil'. The aforesaid transfer pricing adjustment was incorporated in the Draft Assessment Order. The Appellant filed objections before the DRP on the proposed addition. However, the DRP declined to grant any relief to the Appellant holding that the Appellant was not able to justify the claim by following the order of DRP for the Assessment Year 2010-11. Accordingly, Assessing

Officer made transfer pricing adjustment of INR 28,67,592/- in the Final Assessment Order, dated 30.11.2015. Being aggrieved, the Appellant has carried the issue in appeal before us.

10. We note that the DRP had rejected the objections filed by the Appellant on the issue under consideration by following the decision of DRP for the Assessment Year 2010-11. However, in appeal before the Tribunal preferred by the Appellant for the Assessment Year 2010-11 identical issue has been decided in favour of the Appellant (*following the decision of the Tribunal for the Assessment Year 2008-09*) and the addition has been deleted. The relevant extract of the decision of the Tribunal reads as under:

“35. We note that the DRP had rejected the objections filed by the Appellant on the issue under consideration by following the decision of DRP for the Assessment Year 2008-09. In appeal preferred by the Appellant for the Assessment Year 2008-09 identical issue has been decided in favour of the Appellant and the addition has been deleted. The relevant extract of the decision of the Tribunal passed in ITA No. 7718/Mum/2012 on 13.10.2022 reads as under:

“18. We have heard the rival submissions and perused the material on record. While we are not inclined to accept the contention advanced on behalf of the Appellant that an assessee cannot be directed to produce bills/supporting documents pertaining to entire amount of expenses claimed as deduction, we are also alive to the possible burden an assessee would be subjected to during the assessment proceedings in case such a direction is issued to the assessee. However, in cases where the bills and/or supporting documents called for during the assessment proceedings are not furnished, or have been furnished but the same are not found to be sufficient or satisfactory by the assessing officer, the assessing officer would in

our view, be justified in calling for any/all details and/or bills & supporting documents as the Assessing Officer may deem fit. We note that the Appellant is under obligation to maintain proper books of accounts including voucher and documents to support the claim of expenditure. The Appellant has been subjected to statutory as well as tax audit for the relevant assessment year, and no qualifications regarding accounting systems followed by the Appellant or the books of accounts maintained by the Appellant have been made by the Auditors in the audit report and has certified the financial statements to be true and correct after carrying out verification on test check basis. Further, the TPO/Assessing Officer has not pointed out any defect/discrepancy in the bills/supporting documents furnished by the Appellant which constitute 78% of the out of pocket expenses reimbursed by the Appellant to its AE. The Appellant has not furnished bills/supporting documents for INR 42,40,116/- which constitute balance 22% out of pocket expenses reimbursed and only 3.5% $[(42,40,116/11,85,22,998) \times 100]$ of the total expenses reimbursed by the Appellant to its AEs for the relevant assessment year. In view of the aforesaid facts, we are inclined to accept the submission advanced by the Ld. Authorised Representative for the Appellant that the Appellant has substantially complied with the directions given by the Assessing Officer and therefore, in our view, the TPO/Assessing Officer was not justified in making additions of INR 42,40,116/-. Further, in our view, the TPO has also failed to determine the ALP of the transaction and has, in effect, made disallowance holding that the Appellant had failed to substantiate the claim. Accordingly, in view of the aforesaid, we delete the addition of INR 42,40,116/-. Ground No. 2.3 raised by the Appellant is allowed."

36. *The facts in the Assessment Year 2010-11 are identical to those in the Assessment Year 2008-09 with only difference being that for the Assessment Year 2008-09 Appellant had not furnished third-party invoices or other supporting documents for 22% out of pocket expenses reimbursed which is 24% for the Assessment Year 2010-11 which is in issue before us. TPO/Assessing Officer has not pointed out any defect/discrepancy in the bills/supporting documents*

furnished by the Appellant as the same have been examined and accepted. Since there is no change in the facts and circumstances in the assessment year 2010-11 before us as compared to the Assessment Year 2008-09, adopting the reasoning given by the Tribunal in paragraph 18 of the order of the Tribunal for the Assessment Year 2008-09 reproduced hereinabove, we delete the transfer pricing addition of INR 15,37,812/- made in relation to reimbursement of out of pocket expenses to AE. Accordingly, Ground No. 2 raised in the appeal is allowed."

11. There is no change in the facts and circumstances in the present assessment year. The Appellant had not furnished third-party invoices or other supporting documents for 22% out of pocket expenses reimbursed. The TPO/Assessing Officer has not pointed out any defect/discrepancy in the bills/supporting documents furnished .by the Appellant as the same have been examined and accepted. Accordingly, adopting the reasoning given by the Tribunal in the order of the Tribunal for the Assessment Year 2008-09 [ITA No. 7718/Mum/2012 on 13.10.2022] reproduced hereinabove and following the decision of the Tribunal for the Assessment Year 2010-11 [ITA No.2297/Mum/2015], we delete the transfer pricing addition of INR 28,67,592/- made in relation to reimbursement of out of pocket expenses to AE. Accordingly, Ground No. 2 raised in the appeal is allowed.

Ground No. 3 & 4

12. Ground No. 3 is directed against the transfer pricing adjustment of INR 30,31,427/- pertaining to reimbursement of software maintenance expenses (connectivity charges).
13. During the previous year relevant to the Assessment Year 2011-12, the Appellant made a payment of INR 30,31,427/- to

it's AE (i.e., Woolworths limited, Australia) claiming the same to be reimbursement of software maintenance expenses incurred by the AE in the form of connectivity charges which were in addition to Software Maintenance Expenses of INR 55,88,499/- paid by the Appellant to the same AE during the relevant Assessment Year. During the assessment proceedings, TPO issued a notice, dated 31.12.2014, to the Appellant asking the Appellant to show cause why the value of this international transaction of reimbursement of Software Maintenance Expenses of INR 24,69,193/- should not be determined at "Nil". In response, the Appellant filed submission, dated 12.01.2015, explaining that the IT Connectivity Charges of INR.30,31,427/- pertain to IT Connections expenses incurred in relation to the contractual arrangement with a third party contractor to provide connectivity. The TPO was not satisfied with the explanation furnished by the Appellant as the TPO concluded that Appellant had failed to furnish the third party contractor bills/invoices. Scrutiny of the Project Closer Report issued by the third party contractor (M/s. Telstra Corporation Limited) showed that the report was prepared on 10.10.2006 and the services were availed for the previous year ending 31.03.2007. The expenses did not pertaining to the previous year 2010-2011 relevant to the Assessment Year 2011-2012. Thus, the TPO proposed transfer pricing adjustment of INR.30,31,427/- determining the arms length price of this transaction as 'Nil'. The aforesaid transfer pricing adjustment was incorporated by the Assessing Officer in the Draft Assessment order. The Objections filed by the Appellant against Draft Assessment Order on this issue were dismissed resulting in addition of INR. 30,31,427/- on account of the said transfer

pricing adjustment. Being aggrieved the Appellant has carried the issue in appeal before us.

14. Learned Authorised Representative for Appellant appearing before us submitted that the findings returned by the TPO/Assessing Officer are factually correct. He submitted that the Appellant was required to incur monthly charges on connectivity in respect of which rates were prescribed in the Project Closure Report issued by M/s. Telstra Corporation Limited. He submitted that the connectivity charges were incurred for taking dedicated lease lines. He submitted that identical issue had also arisen in the Assessment Year 2010-11.
15. Per Contra, the Learned Departmental Representative relied upon the order passed by the TPO/DRP.
16. We note that this issue has been decided in favour of the Appellant vide order, dated 23.11.2022, passed by the Tribunal while disposing off the appeal for the Assessment Year 2010-11 [ITA No.2297/Mum/2015]. The relevant extract of the decision of the Tribunal reads as under:

“41. We have considered the rival submission and perused the material on record including Annexure 10 and 11 to submission dated 25.11.2013 filed by the Appellant before TPO and the Project Closure Report. The Project Report is dated 10.10.2006. During the hearing the Learned Authorised Representative for Appellant had relied upon Section 2 to the said report giving ‘Cost and Pricing Summary’ to contend that total amount of USD 5,440/- reflected at the bottom on the column with heading ‘Months 1 to 48’ payments to contend that this was the communication charge which was reflected in monthly inter-group account statement under the head ‘communication charges’. On closure scrutiny we note that

the amount of USD 5,440/- is the sum total of amount reflected in column with heading Supply and Installation – ‘Total Monthly Cost’ and the column with heading ‘Manage and Maintain (per Month)’. However, on perusal of ‘Tesla Scope Statement’ it becomes clear that project is for obtaining Global IP VPN connection to help in connectivity between Chullora, Sydney, Australia and Mumbai, India. Thus, the connectivity expenses of INR 24,69,193/- are separate from Software Maintenance Expenses of INR 66,37,327/-. Further, as per the Project Closure Report and the monthly intra-group account statements, the same are being reimbursed at cost. In view of the aforesaid, transfer pricing addition of INR 24,69,193/- is deleted. Ground No.3 is allowed. Ground No. 4 is disposed off as being infructuous.

17. In view of the fact that transfer pricing addition in respect of identical reimbursements to AE having been deleted by the Tribunal in appeal for the Assessment Year 2010-11 [ITA No.2297/Mum/2015, dated 23.11.2022], we deleted the disallowance of INR 30,31,427/- by respectfully following the aforesaid decision of the Tribunal. Accordingly, Ground No. 3 raised by the Appellant is allowed. Ground No. 4 is disposed off as being infructuous.

Ground No. 5

18. Ground No. 5 pertains to initiation of penalty proceedings under Section 271(1)(c) of the Act. The penalty proceedings are separate and distinct from the assessment proceedings. Ground No.5 challenging the initiation of penalty proceedings is disposed off as being premature.

Ground No. 6(a) and 6(b)

19. Ground No. 6(a) and 6(b) are directed against disallowance of lease rental payment of INR 50,43,085/- made by the Appellant

to DHL Lemuir Logistic Private Ltd in terms of 'Agreement For Provision For Warehousing Services'. Identical issue had arisen in the case of the Appellant in appeal for the Assessment Year 2010-11. The Tribunal has remanded the issue back to the file of Assessing Officer for fresh adjudication. The relevant extract of the decision of the Tribunal for the Assessment Year 2010-11 [ITA No.2297/Mum/2015, dated 23.11.2022] reads as under:

"50. We have heard the rival contention and perused the material on record. We note that the Appellant is in the business of wholesale cash and carry and it has taken warehouse on lease from DHL. Some of the relevant clauses of the Lease Agreement are as under:

Definitions::

Management Services' means the management of the facility and resources to achieve the Service as outlined in Schedule 4, reporting as outlined in schedule 5 and day to day operations to the Standard Operating Procedures as detailed in schedule 7.

xx xx

"Service" means the service with respect to Goods that Provider is to provide in the Territory under this agreement as described in schedule 3, and as may be amended in writing by Woolworths India and Provider from time to time.

xx xx

2. Provisions of services and equipment

2.1 Provider provides Services: During the Term, Provider shall, subject to and in accordance with this agreement, provide the Service in the Territory to Woolworths India with respect to Goods, as and when Woolworths India requests.

xx xx

5.1 Services provided from premises: Provider shall provide the services to Woolworths India from the Premises.

5.2 Adequacy of Premises : Provider shall ensure that the requirements set out in schedule 1 are satisfied at all times with respect to the Premises, and that the Premises are suitable and adequate for provision of the Services required by Woolworth India from time to time.

xx xx

5.4 Access: Woolworths India may at any time during Working Hours, having given not less than 24 hours prior notice to Provider (which notice, notwithstanding clause 22.6, may be given orally to the Representative of Provider), enter the Premises and be permitted to conduct an inspection of the Premises, and Woolworths India's Goods stored at the Premises, for the purpose of inspecting or counting Woolworths India's Goods and ensuring that Provider is complying with its obligations under this agreement. Provider shall co-operate fully with Woolworths India with respect to any such inspection so as to ensure that each inspection can be fully, and without hindrance by Provider, carried out by Woolworths India, including providing personnel to meet and assist Woolworths India's personnel during their inspection of the Premises (Including to operate any machinery required to access Woolworths India's Goods). Woolworths India shall endeavour to ensure that such inspection does not unreasonably hinder normal operations.

xx xx

8.5 Warehouse management system: Provider shall be required to operate an electronic software and hardware system provided by Woolworths India on the basis set out in clause 11 for the purpose of providing the Services, and recording information in relation to Woolworths-India's Goods stored-at-the-Premises and the movement of Woolworths India's Goods. Provider shall use the system in performing the Services as described in schedule

Woolworths India shall be responsible for installing, integrating, testing, supporting and maintaining this software system, and Provider's access to this system, and training Provider's personnel in the use of the system, at Woolworths India's cost."

51. *Perusal of the above extracts of the contract shows that the Lease Agreement is not in the nature of a finance lease. Schedule 1 to the Lease Agreement provides that the details of the premises admeasuring 100,000/- Square Feet to be provided to the Appellant. Schedule 2 provides description of service charges which includes monthly warehouse charge of INR 6,25,000/-*
52. *We have perused the orders passed by the Assessing Officer and DRP on this issue. The Appellant had itself contended before the authorities that the Lease Agreement was in the nature of finance lease and therefore, the discussion proceeds on that premise.*
53. *It is admitted position that lease payment of INR 1,00,59,112/- were made by the Appellant to DHL and had also claimed deduction for the same in the computation of taxable income. In appellate proceedings before us, it has been contended that on behalf of the Appellant that the warehouse not been taken on finance lease and the aforesaid amount is allowable as revenue deduction under Section 37(1) of the Act having been incurred wholly and exclusively for the purpose of business. However, we note that in cash flow statement lease rent paid on finance lease of INR 1,00,59,111/- has been shown under the head 'cash flow from the financing activity' . Under Schedule 15 – 'Operating and Administrative Expenses forming part of financial statement for the previous year relevant to the Assessment Year 2009-10, rent is shown as INR 5,50,82,263/-, and warehouse and facility charges are shown at INR 3,45,86,682/-. Further, Schedule 17 – Notes to Accounts mentioned the maturity profile of finance lease obligations. Thus, it is not clear whether the payment of INR 1,00,59,111/- pertain to operating or finance lease obligations of the Appellant. Further, before the Assessing Officer as well as before the DRP the Appellant has maintained the position that the payments of INR 1,00,59,111/- pertain to finance lease. In view of the aforesaid facts, we hold that the issue*

requires verification by the Assessing Officer. Accordingly, this issue is remanded back to the file of Assessing Officer for fresh adjudication. Ground No. 7(a) and 7(b) are allowed for statistical purposes.”

20. There is no change in the facts and circumstances of the case. A perusal of financial statements for the relevant previous year shows that identical disclosures have been made. Further, payments of lease rentals have also been made in terms of the same agreement. Accordingly for Assessment Year 2011-12 also the issue is remanded back to the file of the Assessing Officer for adjudication afresh after giving the Appellant a reasonable opportunity of being heard. In view of the aforesaid directions Ground No. 6(a) and 6(b) are disposed off.

Ground No. 7

21. Ground No.7 pertains to the computation of Book Profit under Section 115JB of the Act. The Learned Departmental Representative submitted that while passing the Final Assessment Order the Assessing Officer has not reduced the brought forward loss from the net profits shown in the Profit & Loss Account while computing Book Profits under Section 115JB of the Act. In this regard he relied upon the Computation of Taxable Income and Notes to Return.
22. A perusal of the Profit and Loss Account pertaining to the financial year ending on 31.03.2011 relevant to the Assessment Year 2011-12 shows that the Appellant had brought forward losses. Further, in Notes to Return enclosed with the Computation of Taxable Income, the Appellant had also furnished details of brought forward loss and depreciation. As per Explanation 1 to Section 115JB of the Act, for computing

Book Profits, the amount of profits shown in Profit & Loss Account are to be reduced by the amount of unabsorbed losses or depreciation whichever is less as per the books of accounts. Therefore, the Assessing Officer is directed to verify the amount of unabsorbed losses and depreciation as per the books of accounts and compute Book Profits as per Section 115JB read with Explanation 1. With the aforesaid directions, Ground No. 7 is stands disposed off.

Ground No. 8 and 9

23. Ground No. 8 and 9 pertain to levy of interest under Section 234B and 234D of the Act, respectively and are being disposed off as being consequential in nature.

In result, the appeal preferred by the Assessee is partly allowed.

Order pronounced on 30.11.2022.

Sd/-
(Amarjit Singh)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 30.11.2022
Alindra, PS

आदेश की 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