

IT(TP)A No.486/Bang/2015
IT(TP)A Nos.301 to 303/Bang/2016, IT(TP)A No.742/Bang/2017,
IT(TP)A No.341 & 3127/Bang/2018 & IT(TP)A No.158/Bang/2020
M/s. Devas Multimedia Pvt. Ltd., Bangalore
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH: BANGALORE

BEFORE SHRI GEORGE GEORGE K., VICE PRESIDENT
AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

IT(TP)A No.486/Bang/2015
Assessment Year: 2010-11

M/s. Devas Multimedia Pvt. Ltd. Unit 502, Prestige Meridian I N.29, M.G. Road Bangalore 560 001 Karnataka PAN NO.AACCD2059H	Vs.	DCIT Circle-1(1)(1) Bangalore
ASSESSEE		RESPONDENT

IT(TP)A Nos.301 to 303/Bang/2016
Assessment Years: 2007-08, 2008-09 & 2011-12 respectively

M/s. Devas Multimedia Pvt. Ltd. Bangalore 560 001 Karnataka	Vs.	DCIT Circle-2(1)(2) Bangalore
ASSESSEE		RESPONDENT

IT(TP)A Nos.742/Bang/2017, IT(TP)A Nos.341 & 3127/Bang/2018
Assessment Years: 2012-13, 2013-14 & 2014-15 respectively

M/s. Devas Multimedia Pvt. Ltd. Bangalore 560 001 Karnataka	Vs.	ACIT Circle-2(1)(2) Bangalore
ASSESSEE		RESPONDENT

IT(TP)A No.158/Bang/2020
Assessment Year: 2009-10

M/s. Devas Multimedia Pvt. Ltd. Bangalore 560 001 Karnataka	Vs.	PCIT Bangalore-2 Bangalore
ASSESSEE		RESPONDENT

Assessee by	:	Shri R.V. Gowtham & Shri Parash Biswal, A.Rs
Revenue by	:	Shri D.K. Mishra, D.R.

Date of Hearing	:	22.02.2024
Date of Pronouncement	:	01.03.2024

ORDER

PER BENCH:

These appeals by assessee are filed against following respective orders of the lower authorities:

S. No.	Appeal No.	AY	Appellant	Respondent (Order passed by)	Section under which order is passed	Date of order
1.	ITA 486/Bang/2015	2010-11	Devas Multimedia Pvt. Ltd., Bangalore	DCIT, Circle-1(1)(1) Bangalore	143(3) r.w.s.144C	23.01.15
2.	ITA 301/Bang/2016	2007-08	-do-	DCIT, Circle-2(1)(2), Bangalore	143(3) r.w.s.147 r.w.s.144C(5) & 144C(13)	28.12.15
3.	ITA 302/Bang/2016	2008-09	-do-	-do-	-do-	-do-
4.	ITA 303/Bang/2016	2011-12	-do-	-do-	-do-	-do-
5.	ITA 742/Bang/2017	2012-13	-do-	ACIT Circle-2(1)(2) Bangalore	143(3) r.w.s. 144C(13)	25.01.17
6.	ITA 341/Bang/2018	2013-14	-do-	-do-	-do-	29.11.17
7.	ITA 3127/Bang/2018	2014-15	-do-	-do-	-do-	24.09.18
8.	ITA 158/Bang/2020	2009-10	-do-	PCIT, Bangalore-2, Bangalore	263	06.12.19

2. The assessee is engaged in the business of Satellite Multimedia Services for end users. In these assessment years, the assessee has challenged both the Transfer Pricing adjustments and addition towards corporate tax except in ITA No.158/Bang/2020.

3. ITA No.158/Bang/2020 for the AY 2009-10 is emanated from the order of Id. PCIT passed u/s 263 of the Income Tax Act, 1961 (in short "The Act"), wherein assessee challenged the invoking of revisionary jurisdiction u/s 263 of the Act and also challenged the invoking of provisions of section 68 of the Act in respect of share premium received by the assessee.

3.1 At the time of hearing, both the parties herein fairly conceded that these orders are passed by the lower authorities before passing of the judgement by Hon'ble Supreme Court in assessee's own case in Civil Appeal No.5766 of 2021 dated 17.01.2022 which have full bearing on the decision of Id. AO in these assessment years and prayed that the issue may be set aside to Id. AO for de-novo consideration to consider the Hon'ble Supreme Court's judgement cited (supra).

4. We have heard the rival submissions and perused the materials available on record. In our opinion, Hon'ble Supreme Court while delivering the above judgement given a finding in paras 12.7 & 12.8, extract of which is as follows:

"12.7 Technically speaking, the appeal before us which is under Section 423 of the Companies Act, 2013, is only on a question of law. When two forums namely NCLT and NCLAT have recorded concurrent findings on facts, it is not open to this Court to re-appreciate evidence. Realising this constraint, the learned Senior Counsel for the Appellant sought to project the case as one of perversity of findings. But we do not find any perversity in the findings recorded by both the Tribunals. These findings are actually borne out by documents, none of which is challenged as fabricated or inadmissible. Though it is sufficient for us to stop at this, let us go a little deeper to find out whether there was any perversity in the findings recorded by the Tribunals and whether such findings could not have been reached by any reasonable standards.

12.8 The following undisputed facts emerge from the documents placed before the Tribunal. The authenticity of these documents were never in question or denied:

- i. An agreement of a huge magnitude, for leasing out five numbers of C X S transponders each of 8.1 MHz capacity and five numbers of S X C transponders each of 2.7 MHz ^ capacity on the Primary Satellite-I (PS-*

- I), was surprisingly and shockingly entered into by Antrix with Devas, without same being preceded by any auction/tender process. It appears from the letter dated 27.09.2004 sent by DEVAS LLC, USA to Shri K.R. Sridhara Murty, Executive Director of Antrix with copies to Dr. G. Madhavan Nair, Chairman, ISRO and others that Shri Ramachandran Viswanathan, met the then Chairman of ISRO and other officials in Bangalore in April-2003 and they met once again in Washington D.C. during the visit of the then Chairman of ISRO. These meetings, which were not preceded by any invitation to the public for any Expression of Interest, culminated in a Memorandum of Understanding dated 28.07.2003. Though it is not clear where the MoU was signed, there are indications that it was signed overseas;*
- ii. *It must be noted here that a one man Committee comprising of Dr. B.N. Suresh, former Member of the Space Commission and Director of Indian Institute of Space Science and Technology, was constituted on 8.12.2009, long after the commencement of the commercial relationship, to look comprehensively into all aspects of the contract, both commercial and technical. According to the Report submitted by him in May-2010, it was Forge Advisors, USA which made a presentation in March-2003, on technology aspects of digital multimedia services to Antrix/ISRO, followed by a presentation in May-2003 purportedly to the top management of Antrix/ ISRO. The MoU was signed thereafter;*
- iii. *But the documents filed by the appellants themselves show that a power point presentation was made by Forge LLC on 22.03.2004, proposing an Indian joint venture to launch what came to be known as DEVAS (which perhaps ultimately turned out to be ASURAS²³). It was claimed in the said proposal that DEVAS platform will be capable of delivering multimedia and information services via \ satellite to mobile devices tailored to the needs of various market segments such as consumer segment, commercial segment and social "segment. This presentation dated 22.03.2004 was followed by a proposal dated 15.04.2004, about which we have made a brief mention in paragraph 3.4 above. This proposal obliged ISRO/Antrix to invest in one operational S-band Satellite with a ground space segment to be leased to a joint venture between Forge and Antrix. What was to be reserved for the joint venture was 97% of the space. The consideration receivable by ISRO/ Antrix upon such a lease, was to be US \$ 11 million annually for a period of 15 years. At least at this stage the proposal to invest in an operational S-band satellite and the lease of nearly the entire space of such satellite to a joint venture, should have come to the public domain, to see, (a) if the technology existed; and (b) if the proposal was commercially viable. But it was not done;*

- iv. *On 14.05.2004, a Committee headed by one Dr. K.N. Shankara, Director, Space Applications Centre was constituted purportedly to examine the technical feasibility, risk management including possibilities of alternate uses of space segment, financial and market aspects and time schedule. According to the Report submitted by this Committee, DEVAS was conceived as a new national service expected to be launched by the end of 2006 that would deliver video, multimedia and information services via high powered satellite to mobile receivers in vehicles and mobile phones across India. The catch here lies in the fact that while it was possible to deliver some of these services via terrestrial-mode, it was not possible at that point of time to provide this bouquet of services via satellite. Even today satellite phones are beyond the reach of a common man. Mobile receivers or devices which can simply receive audio and video content are different from mobile phones, which are capable of providing a two way communication. The technology for providing the services through mobile phones was not in existence at that time, which is why the proposal made by Forge Advisors included an expectation that such a service may be launched by the end of 2006. It was with this expectation/promise that an Agreement was entered into on 28.01.2005 but this so-called new national service was never launched as promised in 2006. The launch of the services was not linked to the provision of a S-band satellite by Antrix, at least at the time when negotiations took place;*
- v. *Admittedly, FIPB (Foreign Investment Promotion Board) approvals taken by Devas during the period May-2006 to September-2009 were on the basis of the ISP (Internet Service Provider) license secured from the Department of Telecommunications on 02.05.2008 and IPTV (Internet Protocol Television) services license obtained on 31.03.2009;*
- vi. *Therefore, the finding of the Tribunal, (a) that a public largesse was doled out in favour of Devas, in contravention of the public policy in India; (b) that Devas enticed Antrix/ISRO to enter into an MoU followed by an Agreement by promising to provide something that was not in existence at that time and which did not come into existence even later; (c) that the licenses and approvals were for completely different services; and (d) that the services offered were not within the scope of SATCOM Policy etc. are actually borne out by records;*
- vii. *There is no denial of the fact that Devas offered a bouquet of services known as (a) Devas Services through a device called (b) Devas device in a hybrid mode of transmission, which is a combination of satellite and terrestrial transmissions, and which is called (c) Devas Technology but none of which existed at the relevant point of time or even thereafter;*

- viii. *Devas did not even hold necessary intellectual property rights in this regard though they claimed to have applied;*
- ix. *That the formation of the company, namely, Devas Multimedia Private Limited was for a fraudulent and unlawful purpose is borne out by the fact that the company was incorporated in December-2004, as a result of preliminary meetings held at Bangalore in March-2003 and in USA in May-2003, followed by the signing of the MoU on 28.07.2003, the presentation made on 22.03.2004 and the discussions held thereafter. The ground work was clearly done during the period from March-2003 to December-2004 before the company was formally incorporated. Immediately after incorporation, the Agreement dated 28.01.2005 was signed. Therefore, the first ingredient of Section 271(c) of the Companies Act, 2013, namely, the formation of the company for a fraudulent and unlawful purpose was clearly made out;*
- x. *The kind of licenses obtained such as ISP and IPTV licenses and the object for which FIPB approvals were taken but showcased as those sufficient for fulfilling the obligations under the Agreement dated 28.01.2005 demonstrated that the affairs of the company were conducted in a fraudulent manner. This is fortified by the fact that a total amount of Rs.579 crores was brought in, but almost 85% of the said amount was siphoned out of India, partly towards establishment of a subsidiary in the US, partly towards business support services and partly towards litigation expenses. We do not know if the amount of Rs.233 crores taken out of India towards litigation services, also became a part of the investment in a more productive venture, namely, arbitration. The manner in which a misleading note was put to the cabinet and the manner in which the minutes of the meeting of TAG sub-committee were manipulated, highlighted by the ^"v Tribunal, also shows that the affairs of the company were conducted in a fraudulent manner. Thus, the second limb of Section 271(c), namely, the conduct of the affairs of the company in a fraudulent manner, also stood established.*
- xi. *SATCOM Policy perceived telecommunication and broadcasting services to be independent of each other and also mutually exclusive. Therefore, a combination of both was not permitted by law. It is especially so since no deliberation took place with the Ministry of Information and Broadcasting. Moreover, unless ICC allocates space segment, to a private player, the same becomes unlawful. This is why the conduct of the affairs of the company became unlawful;*
- xii. *That the officials of the Department of Space and Antrix were in collusion and that it was a case of fence eating the crop (and also allowing others to eat the crop), by joining hands with third parties,*

is borne out by the fact that the Note of the 104th Space Commission did not contain a reference to the Agreement. The Cabinet Note dated 17.11.2005 prepared after ten months of signing of the Agreement, did not make a mention about Devas or the Agreement, but proceeded on the basis as though ISRO received several Expressions of Interest. These materials show the complicity of the officials to allow Devas to have unjust enrichment;

- xiii. It is on record that the minutes of the meeting of the Sub Committee dated 06.01.2009 were manipulated and the experimental licence was granted on 07.05.2009. Only thereafter, the original minutes were restored on 20.11.2009 and that too after protest.*
- xiv. Admittedly, every one of the investors procured shares of the company in liquidation and each shareholder had a representative in the board of directors. Since the board controlled the company, the directors were guilty of the conduct of the affairs of the company in a fraudulent manner. Since each shareholder had a representative in the board, the shareholders had to take the blame for the misdeeds of the directors;*
- xv. Additionally, the shareholders were fully aware of the fact that the application for approval dated 02.02.2006 to the FIPB was for ISP services. But they entered into a Share Subscription Agreement on 06.03.2006 for Devas services. The Share Subscription Agreement discloses that they were aware of the false statements contained in the Agreement dated 28.01.2005. Therefore, the shareholders, who now want to reap the fruits of a tree, fraudulently planted and unlawfully nurtured, cannot feign ignorance and escape the allegations of fraud.”*

4.1 Above findings of Hon'ble Supreme Court is having great bearing on the decision of lower authorities in these assessment years since the said judgement of Hon'ble Supreme Court was delivered subsequent to the decision of the lower authorities and as such, it is appropriate to remit the entire issue in all these appeals except IT(TP)A No.158/Bang/2020 to the file of ld. AO for de-novo consideration to consider the said judgement while passing consequential orders by ld. AO. Hence, all these appeals except IT(TP)A No.158/Bang/2020 are remitted back to the file of ld. AO for de-novo consideration.

5. In the result, IT(TP)A No.486/Bang/2015, IT(TP)A Nos.301 to 303/Bang/2016, IT(TP)A No.742/Bang/2017, IT(TP)A No.341 & 3127/Bang/2018 are partly allowed for statistical purposes.

IT(TP)A No.158/Bang/2020 (AY 2009-10):

6. This appeal is emanated from the order passed u/s 263 of the Act by PCIT dated 6.12.2019, wherein the ld. PCIT has remitted the issue to the ld. AO relating to receipt of share premium u/s 68 of the Act so as to verify the creditworthiness of the share-holders and valuation of the shares of the company. Since, we have remitted various issues in dispute in the assessment year 2009-10 to the file of ld. AO for de-novo consideration by vacating the orders of ld. AO as well as ld. CIT(A), the order passed by ld. PCIT u/s 263 of the Act is infructuous. Accordingly, this appeal of the assessee is dismissed as infructuous.

7. In the result, appeal of the assessee in IT(TP)A No.158/Bang/2020 is dismissed.

Order pronounced in the open court on 1st Mar, 2024

Sd/-
(George George K.)
Vice President

Sd/-
(Chandra Poojari)
Accountant Member

Bangalore,
Dated 1st Mar, 2024.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.