

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

ITA No.722/Bang/2024
Assessment Years : 2010-11

The Dy. Commissioner of Income Tax, Circle-2(1)(1), Bengaluru.	Vs.	M/s Dell International Services India Pvt. Ltd., (for the merged entity Dell India Pvt. Ltd.), Divyashree Greens Sy No.12/1, 12/1A and 13/A, Challaghatta Village, Varthur, Bengaluru-560 071. PAN – AAACH 1925 Q
APPELLANT		RESPONDENT

Assessee by	:	Smt. Mahima Goud, Advocate
Revenue by	:	Shri D.K Mishra, CIT (DR)

Date of hearing	:	30.07.2024
Date of Pronouncement	:	31.07.2024

ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER :

This is an appeal filed by the revenue against the order passed by the CIT(A), Bengaluru-12 dated 06/12/2023 vide DIN No.ITBA/APL/F/APL-1/2023-24/1058509909(1) for the assessment year 2010-11.

2. In the present case, the TPO had made an upward adjustment with respect to the income of the assessee under ITeS segment which

was resolved dated 13-07-2020 by the Competent Authority under Article 27 of the DTAA between India and USA. The effect of the MAP proceedings was given by the AO vide order dated 26.07.2021 determining a revised total income amounting to Rs. 63,32,30,492.00. However, the AO subsequently denied the enhanced deduction claimed by the assessee u/s 10A of the Act in the rectification order passed under section 154 of the Act. As per the AO, though the enhanced deduction was allowed by the ITAT vide order dated 24-06-2020 for the AY 2007-08 in ITA No. 879/Bang/2020 in own case of the assessee, but the same was challenged before the higher forum.

3. On appeal before the Id. CIT-A, the ground of appeal of the assessee was allowed by observing as under:

5. FINDINGS AND DECISION

The grounds of appeal, statement of facts, the submissions made by the appellant in response to hearing notices and the order of the Ld. AO have been carefully considered. The grounds of appeal are adjudicated as under.

The issue at hand in the present appeal viz. the additional income arising on account of the MAP resolution being eligible for consideration for computing deduction under section 10A of the Act, has been adjudicated by the jurisdictional Tribunal in the appellant's own case for the A.Ys. 2007-08 and 2008-09. The relevant portion of the Tribunal order for A.Y. 2007-08, which has been followed for A.Y. 2008-09, is reproduced below:

31. We have given a very careful consideration to the rival submissions. As far as the provisions of the Act are concerned, the provisions of the section 92CA(4) reads as follows:- "(4) Where an arm's length price is determined by the Assessing Officer under sub-section (3), the Assessing Officer may compute the total income of the assessee having regard to the arm's length price so determined :

Provided that no deduction under section 10A or section 10AA or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section ."

32. A reading of the first proviso to section 92C(4) of the Act would show that deduction 10A will not be allowed in respect of amount of income by which the total income of the assessee is enhanced after computation of income u/s. 92C(4) of the Act by the TPO which in turn is based on the Arm's Length Price computed by the Assessing Officer pursuant to order of TPO passed u/s.92CA(3) of the Act. Section 92CA(4) of the Act refers to the ALP determined by the AO. The first question that needs to be answered is as to, whether the price agreed under the MAP can be said to be the ALP determined by the AO. The MAP is a procedure agreed between the two countries under Double Taxation Avoidance Agreement (DTAA). Article 27 of the CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME reads as under: -

“ARTICLE 27 MUTUAL AGREEMENT PROCEDURE

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or national. This case must be presented within three years of the date of receipt of notice of the action which gives rise to taxation not in accordance with the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits or other procedural limitations in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, shall develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this Article. In addition, a competent authority may devise appropriate unilateral procedures, conditions, methods and techniques to facilitate the abovementioned bilateral actions and the implementation of the mutual agreement procedure.”

33. The provisions of Rule 44H of the Income Tax Rules, 1962 (Rules) provides the manner in which resolution of disputes under mutual agreement procedure are to be given effect to and it reads thus:

"44H. Action by the Competent Authority of India and procedure for giving effect to the decision under the agreement.—

(1) Where a reference has been received from the competent authority of a country outside India under any agreement with that country with regard to any action taken by any income-tax authority in India, the Competent Authority in India shall call for and examine the relevant records with a view to give his response to the competent authority of the country outside India.

(2) The Competent Authority in India shall endeavour to arrive at a resolution of the case in accordance with such agreement.

(3) The resolution arrived at under mutual agreement procedure, in consultation with the competent authority of the country outside India, shall be communicated, wherever necessary, to the Chief Commissioner or the Director-General of Income-tax, as the case may be, in writing.

(4) The effect to the resolution arrived at under mutual agreement procedure shall be given by the Assessing Officer within ninety days of receipt of the same by the Chief Commissioner or the Director-General of Income-tax, if the assessee,—

(i) gives his acceptance to the resolution taken under mutual agreement procedure; and

(ii) withdraws his appeal, if any, pending on the issue which was the subject matter for adjudication under mutual agreement procedure.

(5) The amount of tax, interest or penalty already determined shall be adjusted after incorporating the decision taken under mutual agreement procedure in the manner provided under the Income-tax Act, 1961 (43 of 1961), or the rules made thereunder to the extent that they are not contrary to the resolution arrived at.

Explanation.— For the purposes of rules 44G and 44H, "Competent Authority of India" shall mean an officer authorised by the Central Government for the purposes of discharging the functions as such."

34. The purpose for which the first proviso of section 92CA(4) of the Act was enacted is given in the CBDT Circular No.14/2001 dated 09.11.2001 as follows:-

"55.12 The first proviso to section 92C(4) recognizes the commercial reality that even when a transfer pricing adjustment is made under that sub-section, the amount represented by the adjustment would not actually have been received in India or would have actually gone out of the country. Therefore, it has been provided that no deductions u/s 10A or 10B or under Chapter VI-A shall be allowed in respect of the amount of adjustment."

33. In the present case the conditions under which the dispute was resolved under MAP, was that the Assessee had to increase its taxable income and the sum agreed was to be subsequently invoiced and realized and thereby there was inflow of foreign exchange in India. Such features do not exist when the adjustment to ALP is suggested by a TPO which is subsequently incorporated in an order of assessment by the AO.

34. The Pune Bench of the ITAT had an occasion to deal with an identical question in the context of determination of ALP under the Advance Pricing

Arrangement [APA] in the case of Dar Al Handasah Consultants (Shair & Partners) India Private Limited (supra) and took the view that deduction u/s. 10A of the Act on additional income offered as per APA would be eligible to claim deduction u/s. 10AA.

35. As rightly pointed out by the learned counsel for the Assessee in the course of his argument, the addition on account of determination of ALP can be in a different manner

- (i) suo motu by the assessee in his return of income;
- (ii) by the Assessing Officer has been accepted by the assessee or to the extent confirmed by the appellate forums under the Act;
- (iii) determined by an advance pricing agreement
- (iv) is made as per the safe harbour rules framed under section 92CB; or
- (v) is arising as a result of resolution of an assessment by way of the mutual agreement procedure under an agreement entered into under section 90 or section 90A for avoidance of double taxation,

36. The proviso to section 92CA(4) of the Act will apply only to adjustment to transfer pricing made by the AO which is enumerated in Sl.No.(ii) above and not to any other modes of determination of ALP. The decision of the Pune Bench of ITAT in the case of Dar Al Handasah Consultants (Shair & Partners) India Private Limited (supra) will be clearly applicable to the facts of the present case.

37. Another issue which was addressed by the parties before us was the question, whether non-receipt of foreign exchange within the period required u/s. 10A of the Act would be a bar to allow the deduction in AY 2007-08. In this regard, it is undisputed that the assessee has received foreign exchange in respect of the sum agreed under the MAP and has duly accounted for in its books of account in AY 2016-17. However, the said income was excluded in the computation of total income in AY 2016-17. On identical facts, the Pune Bench of the Tribunal in the case of Dar Al Handasah Consultants (Shair & Partners) India Private Limited (supra) took the view that deduction u/s. 10A has to be allowed in the assessment year in which the international transaction took place. The following were the relevant observations of the Tribunal:-

"iii. Whether the assessee has satisfied the conditions of deduction u/s 10A?

14. Now we turn to the view canvassed by the AO that the assessee failed to comply with the mandate of sub-section (3) of section 10A, which provides that:

"This section applies to the undertaking, if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into India, by the assessee in convertible foreign exchange, within a period of six months from the end of the previous year or within such further period as the competent authority may allow in this behalf". A perusal of sub-section (3) of section 10A transpires that the condition for bringing into India the requisite convertible foreign exchange within a period of six months from the end of the previous year is not be all end all of the issue. It also extends to "such further period as the competent authority may allow in this behalf". In other words, if the competent

authority has allowed further period for bringing into India the convertible foreign exchange, the assessee will be entitled to deduction u/s.10A. Explanation 1 to section 10A(3) states that: 'For the purposes of this sub-section, the expression "competent authority" means the Reserve Bank of India or such other authority as is authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.'

15. Sub-section (1) of section 92CC provides that "The Board, with the approval of the Central Government, may enter into an advance pricing agreement with any person ". It is thus clear from the mandate of sub-section (1) of section 92CC that the CBDT enters into an APA with the approval of the Central Government.

The APA is a package deal aimed at reducing litigation. If the APA contains some clause relaxing the rigor of any provision or to facilitate its workability, such a clause will prevail over the normal provisions of the Act. It is mandated by the legislature itself through sub-section (2) of section 92CD, which opens with a saving clause by providing: 'Save as otherwise provided in this section', all other provisions of the Act shall apply. Sub-section (1) of section 92CD provides that:

'.... such a person shall furnish a modified return in accordance with and limited to the agreement.' A corollary which follows on a harmonious construction of sub-sections (1) and (2) of section 92CD is that if the APA contains a clause departing from the normal provisions, it is such clause which shall prevail upon the normal provision.

16. We have gone through the APA entered between the assessee and the CBDT. Clause 7 of the APA discusses the "Critical assumptions". It provides that:

'the critical assumptions (as referred to in the Rules) shall, for the purposes of this Agreement, be as specified in Appendix II.' Clause 5 of the Appendix II deals with 'Invoicing and Credit terms'. The material part of such a clause, which is relevant for the year under consideration, states that: '... the Applicant shall show the difference between the invoiced amount for the previous year/rollback years and the ALP as agreed, as tax adjustment in the modified tax returns for Assessment year 2010-11 to Assessment year 2014-15 and will also raise an invoice (and realise it) for the equivalent amount in the month following the month in which the Agreement is signed'. On going through the relevant parts of clause 5 of the Appendix II, it clearly emerges that the CBDT provided for raising the invoice for the additional amount and also 'realise it' in the month following the month in which the APA is signed. To put it simply, the CBDT not only stipulated for raising of the invoice for the additional income but also for the realization of the additional amount within the month following the month in which the Agreement is signed. Thus, it is overt that the APA contains a clause for realizing the amount or bringing into India convertible foreign exchange for the additional amount of invoice within one month's period. There can be no other reason for mandating in the APA for bringing into India convertible foreign exchange within one month following the month in which the APA is signed except for the granting the consequential benefits of such realization, even though sub-section (1) of

section 92CD gives time of three months for filing the modified return. The sequitur is that the APA has made it mandatory for the assessee to bring in convertible foreign exchange in India within one month. But for granting the relevant deductions connected with the realization of convertible foreign exchange in India, there was no purpose to stipulate it in the APA. This stipulation is, thus, a direction to grant deduction u/s 10A only if the assessee succeeds in bringing in convertible foreign exchange in India within one month, bringing the case within the saving clause of sub-section (2) of section 92CD. As the assessee brought into India the convertible foreign exchange within the stipulated one month's period, it became entitled to deduction u/s 10A.

17. What is further pertinent to note from para 2 of the Clause 6 of the APA is that: "The determination of ALP for Rollback years is subject to the condition that the ALP would get modified to the extent that it does not result in reducing the total income or increasing the total loss, as the case may be, of the applicant as already declared in the return of income of the said year". Reverting to facts of the extant case, it is seen that the assessee declared total income of Rs.45,21,431/- in the original return. After the increase in the income due to the APA and with the simultaneous claim of deduction u/s.10A, the total income of the assessee as declared in the modified return remained at the same level.

Thus, it is neither a case of reducing the total income nor increasing the total loss. Ex consequenti, it is held that the assessee has satisfied the condition of deduction u/s 10A(3) read with section 92CD(2) of the Act.

18. To sum up, we hold that the proviso to section 92C(4) does not debar deduction u/s 10A on additional income in assessment u/s 92CD; assessment u/s 92CD provides for granting deduction u/s 10A; and the assessee has satisfied the requirement of section 10A(3) read with section 92CD(2), thereby entitling it to deduction u/s.10A on the additional amount of Rs.20,36,023/-. The impugned order is overturned and deduction is granted.

19. In the result, the appeal is allowed."

38. We have already observed that similar to provisions of section 92CC of the Act, the provisions of the DTAA r.w.s. 90(2) of the Act provide to the contrary in matters where issues are settled under the MAP. Following the decision of the Tribunal referred to above, we hold that the assessee should be allowed the benefit of deduction u/s. 10A of the Act in respect of the amount settled under the MAP for the AY 2007-08. Accordingly, the relevant grounds of appeal are allowed."

In the light of the above finding of the jurisdictional Tribunal in the appellant's own case and respectfully following the same, the appeal of the assessee is allowed."

4. Being aggrieved by the order of the Id. CIT-A, the revenue is in appeal before us.

5. Both the Id. DR and the AR before us vehemently supported the order of the authorities below as favourable to them.

6. We have heard the rival contentions of both the parties and perused the materials available on record. At the outset, we note that the issue on hand has already been decided by the ITAT in the own case of the assessee for the AY 2007-08 in ITA No. 879/Bang/2020 in its favour which has been duly reproduced by the learned CIT-A in his order. The same has been extracted in the earlier paragraph. Even at the time of hearing, the Id. DR before us has not brought anything on record contrary to the findings given by the Id. CIT-A. Accordingly, in view of the above, we do not find any reason to interfere in the order of the Id. CIT-A. Hence the ground of appeal of the revenue is hereby dismissed.

7. In the result, the appeal filed by the revenue is hereby dismissed.

Order pronounced in court virtually on 31st day of July, 2024

Sd/-

Sd/-

(BEENA PILLAI)

Judicial Member

Bangalore

Dated, 31st July, 2024

/ vms /

Copy to:

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

(WASEEM AHMED)

Accountant Member

By order

Asst. Registrar, ITAT, Bangalore