



आयकर अपीलिय अधिकरण "ए" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI**

श्री बी आर भास्करन, लेखा सदस्य एवं

श्री अमित शुक्ला, न्यायिक सदस्य के समक्ष ।

**BEFORE SHRI B R BASKARAN, ACCOUNTANT MEMBER AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER**

ITA No. : 6762/Mum/2012

(Assessment year: 2006-07)

DCIT -10(1), 455, Aayakar Bhavan, 4 th Floor, M K Road, Mumbai -400 020	Vs	कोडेक ग्राफिक कम्प्युनिकेशन (आई) प्राइवेट लिमिटेड M/s Kodak Graphic Communication(I) Pvt Ltd, 3 rd Floor, Kalpataru Suynergy Off Western Express Highway, Vakola, Santacruz (East), Mumbai -400 055 PAN: AABCK 1644 C
अपीलार्थी (Appellant)		प्रत्यर्थी (Respondent)
Appellant by	:	श्री सचिदानंद दुबे Shri Sachidand Dube
Respondent by	:	श्री जितेंद्र जैन Shri Jitendra Jain

सुनवाई की तारीख /Date of Hearing : 03-08-2016

घोषणा की तारीख /Date of Pronouncement : 26-08-2016

आदेश

ORDER

श्री अमित शुक्ला, न्या स:

PER AMIT SHUKLA, JM:

The aforesaid appeal has been filed by the revenue against impugned order dated 02.08.2012, passed by Ld. CIT(Appeals)-15, Mumbai in relation to the penalty

proceedings under section 271(1)(c) for assessment year 2006-07. The revenue is mainly aggrieved by the deletion of penalty of Rs.79,21,852/-. In the grounds of appeal following grounds have been raised:-

"1. On the facts and the circumstances of the case and in law the Ld.CIT(A) erred in deleting the penalty u/s. 271(1)(c) of the Act on Rs.1,72,53,390/-, addition of which was made by the AO as per the order of the TPO which relates to import of plate and therefore the assessee had furnished inaccurate particulars of its income and concealed the same.

2. On the facts and the circumstances of the case the Ld.CIT(A) erred in deleting the penalty u/s. 271(1)(c) of the Act holding that RPM method was not applicable ignoring the fact that the TPO after scientifically evaluating all the options held that this is the just & fair method. Further erred in adopting the CUP method of the assessee ignoring the findings of the TPO & the AO.

3. On the facts and the circumstances of the case the Ld.CIT(A) erred in deleting the penalty u/s. 271(1)(c) of the Act consequent to deleting the TP adjustment of Rs.47,16,000/- made in respect of fees for technical services. The assessee failed to furnish any documentary evidence for the charge levied by the AE which is in the nature of services rendered by the personnel of the AE to the assessee company to support and maintain equipments supplied to customers in India.

4. On the facts and the circumstances of the case the Ld.CIT(A) erred in deleting the penalty u/s. 271(1)(c) of the Act levied on account of disallowance of depreciation on the intangible asset the value of which on verification was found at NIL by the AO.

5. The appellant prays that the order of CIT(A) on the above ground be set aside and that of the assessing officer be restored"

2. Thus, penalty has been levied on Transfer Pricing adjustment on account of:-

- (i) Transaction of distribution of plates of Rs.1,72,53,390/-; and
- (ii) On account of technical services of Rs.47,61,900/-

3. At the outset, the Ld. Counsel for the assessee submitted that, so far as the issue of Transfer Pricing adjustment of Rs.1,72,53,390/- made on account of import of plates from AE is concerned, this issue has been set aside to the file of the AO for fresh adjudication by the Tribunal vide order dated 20.01.2014 in ITA No.8710/Mum/2010, that is, in the quantum proceedings, therefore, the levy of penalty on this addition does not stand. While doing so, the Tribunal has followed the earlier year order of the Tribunal for the AY 2004-05.

4. Ld. DR also admitted that this issue has been set aside to the file of the TPO.

5. After considering the aforesaid submissions, we find that, so far as the levy of penalty on account of TP adjustment of Rs.1,72,53,390/- in respect of purchases of plates from AE, we find that the Tribunal has set aside this issue to the file of the TPO for fresh adjudication as per the directions given by the Tribunal in the quantum proceedings in the AY 2004-05. Thus, when the entire matter has been set aside and remanded back for fresh adjudication, the penalty levied

on the basis of impugned assessment order cannot be sustained, hence the same is directed to be deleted.

6. So far as the levy of penalty on T P adjustment of Rs.41,61,900/-, facts in brief are that, assessee had made payment of Rs.47,61,900/- to Kotak Polychrome Graphics, Singapore Pte. Ltd towards travel and salary costs of specialized technical personnel to provide technical support in connection with Computer to Plate Equipments which were newly launched and high end technology product at that point of time. These payments relate to the payment for personnel which included costs relating to the travelling as well as for the time spent in India by the technical person sent by the AE. In support of such a payment, a 'Debit Note' was also produced. However, the TPO made the adjustment on the ground that, there are no documentary evidences for rendering of services by these personnel and, therefore, he has taken ALP of this transaction at "Nil". He further observed that, there is no detail regarding rendering of professional/technical services mentioned in the 'debit note', accordingly, the arm's length value of this transaction was taken at "Nil" and entire payment of Rs.41,61,900/- was adjusted to the Arm's Length Price. This was confirmed by the DRP also by holding that, TPO has rightly considered the Arm's Length Value of the transaction at "Nil". In the second appeal before the Tribunal, we find that the Tribunal has confirmed the said addition after observing and holding as under:-

With regard to the third issue, we firstly observe that the impugned disallowance, as sought to be abundantly clarified per the assessment order, is not u/s. 40(a)(ia). Rather, we find no adjustment to the returned income of Rs.702.89 lacs in respect of the said claim; a fact which the A.O. seeks to emphasize. The assessee's grievance is, thus, misconceived. As apparent from the assessment order, the disallowance u/s. 40(a), as initially proposed by the A.O., was u/s. 37(1), i.e., in the absence of the requisite details, and only alternatively, i.e., without prejudice, u/s. 40(a)(ia) (refer paras 8.1 and 8.2 of the assessment order). Even before us the assessee, apart from a debit note, which is not legible at all (PB pg. 168), could hardly furnish any material or evidence with regard to the rendering of the services, i.e., as was the case before the Revenue authorities. The Id. AR also conceded before us to no material being available with the assessee to establish the rendering of the relevant services, which though is rendered of no consequence in the facts of the case. Under the circumstances, the assessee's grievance, as projected per its Ground No. 10, is wholly misconceived and unmaintainable. We decide accordingly”

7. The penalty has been levied on such an adjustment/addition by the AO which has been deleted by the CIT(A).

8. We have heard the rival submissions made by the parties before us and also perused the relevant finding given in the impugned orders as well as the finding given in the quantum proceedings up till the stage of the Tribunal. The assessee has made payment of US \$ 1,00,000, equivalent to INR.41,61,900/- relating to charge incurred during the year towards visit of “Specialized Technical Persons” from Singapore AE as per the debit note raised. In the quantum proceedings,

the assessee has stated that these payments were made towards salary of specialized technical persons sent for providing technical support in connection with the various high end technology products and equipments provided by the AE. The value of the said transaction for the purpose of ALP has been taken at "Nil" by the TPO/AO on the ground that documentary evidences for rendering of services has not been given. The assessee's case before us as well as before the authorities below has been that, it has been receiving technical support from the AE on the regular basis and the Auditors in the Audit Report have taken a note of this fact in Form 3CEB, which on the basis of relevant data provided. Since there was a merger with Kotak India Pvt. Ltd w.e.f. 01.04.2008 under the orders of Bombay High court on 4th July, 2008 many of the employees had left the job post merger, therefore, the assessee could not produce the necessary documents except for the 'debit note' raised by the AE. It was further contented by the Id. Counsel before us that the entire transaction has been benchmarked using TNMM as MAM and assessee has deducted TDS on the entire payment @ 15.7% made to the AE, the detail of which were produced before the AO. On these facts, it cannot be held that ALP adjustment can be or should be taken at "Nil". Ld. Counsel before us further stated that the observation and finding of the Tribunal in the quantum order (which has been reproduced by us above) has proceeded with the issue on erroneous footing without properly appreciating the facts correctly. It was not a case of disallowance u/s

40(a)(i) by the departmental authorities but the ALP of the payment was taken at “nill” and moreover, Tribunal has held that ‘debit note’ submitted was not legible. Now the legible copy of the same has been filed. Hence it is not a case of a disallowance of any claim of expenditure under section 37(1) *albeit* the value of the transaction has been taken at “Nil”. We find great substance in the arguments placed by the Ld. Counsel, because as reiterated above, here the issue related to transfer pricing adjustment which has been made by departmental authorities by taking the value of the international transaction at “Nil”. While arriving at such a conclusion, neither the TPO nor the DRP has given any analysis as to why such an adjustment is required to be made when TNMM has been applied and when overall profit margin and the method has not been disturbed. The TPO for making an adjustment in the ALP has to benchmark the transaction and the ALP with the comparables under the prescribed Indian Transfer Pricing Regulations. He cannot value the ALP of the transaction at “Nil” without adhering to the proper procedure of law laid down under the Act and relevant rules. It is further noticed that, no penalty was levied in the case of the assessee for non-furnishing of the information and documents as required under section 92D(3), for which separate penal provision under section 271G have been prescribed. Thus on these facts and circumstances, *prima facie* we are of the opinion that no case can be made for the levy of penalty u/s 271(1)(c). Accordingly, we hold that penalty levied by the AO

under section 271(1) (c) cannot be legally and factually sustained and therefore, the deletion of penalty by the Ld. CIT(A) is affirmed. The relevant observation and finding of ld. CIT(A) which reads as under:-

“Under facts and circumstances of the case when the appellant’s benchmarking of this international transaction following TNMM has not been disputed, further when such payment in the facts has not been disputed the merely for none furnishing of documents evidencing receipt of services by the appellant, there cannot be conclusion that can arrived that the benchmarking so done by the appellant either was without due diligence and lacked good faith. Accordingly, penalty so imposed on this amount of adjustment cannot be sustained and is directed to be deleted”.

is upheld. Thus, ground no.3 as raised by the revenue is dismissed.

9. In the result, appeal of the revenue stands dismissed.

Order pronounced in the open court on 26th August, 2016.

Sd/-

(बी आर भास्करन)

लेखा सदस्य

(B R BASKARAN)

ACCOUNTANT MEMBER

Sd/-

(अमित शुक्ला)

न्याईक सदस्य

(AMIT SHUKLA)

JUDICIAL MEMBER

Mumbai, Date: 26th August, 2016.

प्रति/Copy to:-

- 1) अपीलार्थी /The Appellant.
 - 2) प्रत्यर्थी /The Respondent.
 - 3) The CIT(A) -15, Mumbai.
 - 4) The CIT -10, Concerned___, Mumbai
 - 5) विभागीय प्रतिनिधि "ए", आयकर अपीलीय अधिकरण, मुंबई/
The D.R. "F" Bench, Mumbai.
 - 6) गार्ड फाईल \
- Copy to Guard File.

आदेशानुसार/By Order

/ / True Copy / /

उप/सहायक पंजीकार

आयकर अपीलीय अधिकरण, मुंबई

Dy./Asstt. Registrar

I.T.A.T., Mumbai

*चव्हान व.नि.स

*Chavan, Sr.PS