

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1": NEW DELHI
BEFORE SHRI I.C. SUDHIR, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No. 2731/Del/2009
(Assessment Year: 2003-04)

DCIT,
Circle-6(1),
New Delhi

Vs.

Marconi
Telecommunication
India Pvt. Ltd, B-92,
Himalaya House, 23,
K.G. Marg,

New Delhi

(Appellant)

PAN:AACCM7096H
(Respondent)

ITA No. 2303/Del/2009
(Assessment Year: 2003-04)

Marconi Telecommunication
India Pvt. Ltd, B-92, Himalaya
House,
23, K.G. Marg, New Delhi

Vs.

DCIT,
Circle-6(1),
New Delhi

PAN:AACCM7096H
(Appellant)

(Respondent)

Assessee by : Sh.Anand Periwal, CA

Revenue by : Sh. Amlendra Kumar, CIT DR

ORDER

PER PRASHANT MAHARISHI, A. M.

1. Captioned cross appeals filed by the revenue and assessee is directed against the order of learned CIT (A)-XX, New Delhi dated 30.03.2009. The revenue raised the following grounds of appeal:

- “1. The order of the learned CIT (APPEALS) is erroneous & contrary to facts and law.*
- 2. The Ld. CIT(A) has erred in law and in fact by reducing addition on account of Arm's length price from Rs.4,57,00,000/- to Rs.2,91,40,738/- ignoring the findings and reasons as recorded by the TPO in his order.*
- 3.(i) The Ld. CIT(A) has erred in law and in facts by allowing for adhoc 50% adjustments in the start up costs incurred by the assessee in calculating the operating margins of the tested party disregarding provisions of Rule 10B(3)(ii) which provide for reasonably accurate adjustments.*
- (ii) The Ld. CIT(A) erred on law and on facts by ignoring the remand report of the TPO dated 26.11.2007 stating that the onus was on the taxpayer to demonstrate that startup costs and resultant losses are on account of the international transactions and that the comparability adjustment was required to improve comparability analysis.*
- (iii) The Ld. CIT(A) has erred in law and on facts by not considering his own observations that the assessee in spite of having being granted numerous opportunities was unable to furnish proof/ vouchers of the costs incurred to prove that they were in the nature of extraordinary costs.*
- (iv) The Ld. CIT (A) has erred in law and one facts by ignoring the most important fact that the assessee had not advanced the said claim before the TPO during the transfer pricing transfer-pricing proceedings.*
- (v) The Ld. CIT(A) has erred in law and on facts by not considering the remand the TPO dated 26.11.2007 stating that the additional evidence now being by assessee is inadmissible in law as the said claim was not made before the TPO in the original proceedings.*
- 4. (i) The Ld. CIT (A) has erred in law and fact by granting working capital adjustment to the assessee.*
- (ii) The Ld. CIT (A) has erred in law and facts by not considering that the assessee had not make any claim for working capital adjustment in its TP report, nor in its submission before TPO during TP proceedings.*
- (iii) The Ld., CIT (A) has erred in law and in facts by not considering that the Indian Transfer Pricing regulations. Rule 10B (3) stipulates only "reasonable accurate adjustment". No reliable data and documentation have been furnished by the assessee regarding trade and non-trade debtors and creditors of the comparables at the end of the year. The said information is also not available in the published accounts of the comparables. Intact, most of the comparables are*

found to be using own funds rather than borrowed funds for running of their business.

- (iv) The Ld. CIT (A) has erred in law and in facts by not considering that even the OECD guidelines on Transfer Pricing and the OECD draft talks about selecting only those comparables for working capital adjustment where accurate financial information, reliable data, reliability of the adjustment and proper documentation is available.*
 - (v) The Ld. CIT (A) has erred in law and in facts by not considering a fact that, operation of M/s. Philips Software Centre Pvt. Ltd. [2008] 26 SOT (BANG.), order of Hon'ble ITAT on working capital adjustment has been stayed by Hon'ble Karnataka High Court. [(2009) TIOL-123-HC-Kar-IT] on the plea of the department that rule 10B (3) (iii) stipulates for only reasonably accurate adjustment.*
5. *The appellant craves leave to add, to alter, or amend any grounds of the appeal raised above at the time of the hearing.”*

2. In its appeal assessee has raised the following grounds:-

- “1. that on facts and in law the order's passed by the AO/TPO/CIT (A) are bad in law and void ab-initio.*
- 2. That the CIT(A) has erred in holding an addition of Rs. 29,140,738 for alleged difference in the arm's length price of the import of finished goods as determined by the TPO and that determined by the Appellant.*
- 3. That the CIT (A) failed to consider the gross margin analysis undertaken by the Appellant for determining the arm's length price of its the international transaction pertaining to import of finished goods.*
- 4. That the CIT (A) has erred by not providing adequate deduction for start-up expenses incurred by the Appellant while computing the transfer price.*
- 5. That the Id. CIT (A) erred in law in not applying the Proviso to section 92C of the Act and has failed to allow the Appellant the benefit of downward variation of 5 percent in determining the arm's length price.*
- 6. that the CIT (A) has erred, in law and on facts, by levying interest under section 234B of the Act.”*

3. The facts in brief of the case are that the assessee was engaged in the business of trading of Tele-communications equipments. The assessee filed return of income on 28.11.2003 declaring loss of Rs.4,19,09,592/-.

The case was selected for scrutiny and notice u/s 143(2) was issued on 19.10.2004 and fixed the case of the assessee for 28.04.2004. A revised return was filed by the assessee on 13.12.2004 declaring loss of Rs.4,14,92,280/-. Later on the case of the assessee was referred to TPO for determination of Arm's Length Price. The report of the TPO was received on 10.03.2006 wherein the TPO vide his order u/s 92CA (3) dated 08.03.2006 proposed an addition of Rs.4.57 crores on account of difference between the Arm's Length Price determined by the Transfer Pricing Officer and Price adopted by the assessee. Aggrieved the assessee filed an before the learned Commissioner of Income-tax (Appeals) who held that

- a. admitting the claim of the assessee for adjustment of working capital and partly allowing the same
 - b. On Start Up cost adjustment CIT (A) held that 50 % of travelling and conveyance, legal and professional fees and communication expenses.
4. Against the above two issues the revenue is in appeal before us vide ground no 3 regarding adhoc adjustments granted by CIT (A) and ground no 4 regarding granting of working capital adjustment to the assessee.
 5. Assessee has also preferred appeal against the order of CIT (A) contesting the inadequate relief on account of startup cost by CIT (A) vide its ground of appeal no four. Assessee has further contested that order of CIT (A) on adjustment on account of difference in the determination of ALP on import of finished goods. Assessee has also contested that CIT (A) has failed to allow the appellant benefit of downward variation of 5 % in determining Alp.
 6. We take up the appeal of the revenue first.
 7. The ground no one & two of the appeal of the revenue are general in nature and both the parties on this ground put no arguments and therefore same are dismissed.

8. The ground no three of the appeal of the revenue is against granting the ad hoc deduction on account of startup cost. On this issue both the parties aggrieved that the issue was decided by Coordinate bench of ITAT in case of the assessee for AY 2003-04 in ITA No 5215/Del/2010 in para no 11 where in Hon ITAT has set aside the issue to the file of CIT (A).
9. We have carefully considered the rival contentions and are convinced that the coordinate bench in the case of the assessee for AY 2004-05, has adjudicated the issue and both the parties agreed about the similarity of facts. Coordinate bench has decided this issue in that appeal the issue of startup cost as under :-

“11. We have carefully considered the submissions and perused the records. We find cogency in the submission of the Ld. Departmental representative. Ld. Commissioner of Income tax (appeals) has asked the assessee to file the details of expenditure incurred on account of travelling and conveyance and professional and communication. In this, regard Ld. Commissioner of Income tax (Appeals) thus failed to follow rules of natural justice, as there was apparent violation of rule 46A in as much as no opportunity was provided to the TPO in this regard. We further agree with the Ld. Counsel of the assessee that the order of Ld. Commissioner of Income tax (appeals) is a non-speaking order as did not give reasons for making adjustments to the operating result of the tested party i.e. assessee. It is also not clear how she arrived at the conclusion that 30 % of the expenses were extra ordinary and required adjustment. It is also noted that assessee company had not claimed any adjustment on account of specified expenses in the transfer pricing study of documentation prepared under Rule 10D read with section 92D of the Act. In these circumstances, in the background of aforesaid discussion, in our considered opinion, the matter needs to be remitted to the file of the Ld. Commissioner of Income tax (appeals) to consider the issue afresh, after giving adequate opportunity to the TPO of being heard. Both the counsel fairly agreed to this proposition. Accordingly, the matter stands remitted to the file of Ld. Commissioner of Income tax (appeals).”

10. In this appeal also, assessee did not furnish the details of expenses called for by CIT (A) and even then, CIT (A) has granted the deduction of 50 % of such expenditure. However in absence of the details we fail, to understand how CIT (A) granted deduction @ 50 % and there is no justification for such an adhoc application of percentage. In our view, the expenses needs to have been examined then whatever amount of such expenses are considered reasonable it should have been allowed as startup cost while working out PLI of the assessee. Assessee also should have supported the stand not only on principles but also on facts in demonstrating the issue, which is not done in this AY. Therefore respectfully following the decision of coordinate bench we set aside this issue to the file of CIT (A) for this year also to consider the issue afresh after providing adequate opportunity to assessee to place on record requites details and submissions and then grant deduction of startup cost, if any, in accordance with law. In the result ground, no. three of the appeal of the revenue is adjudicated accordingly.
11. Ground no four of the appeal of the revenue is against the partial relief granted by CIT (A) regarding working capital adjustment.
12. Ld. DR relied on the order of TOP /AO and submitted that it is allowed by CIT (A) to the erroneously.
13. LD AR submitted that AO himself has categorically allowed the working capital adjustment to the assessee in AY 2004-05. Fr this he placed on record the assessment order dated 13.12.2006 for AY 2004.05. He drew our attention to para no seven himself has given justification for the same and granted assessee working capital adjustments.
14. We have carefully considered the rival contention and are convinced that as in AY 2004-05 AO himself has granted the working adjustment to the assessee it should be allowed to the assessee for AY 2003-04 also. LD DR failed to point out any change in the facts and circumstances of the case of this year compared to AY 2004-05. Therefore, we are convinced that assessee is eligible for grant of working capital adjustment. Therefore,

- we set aside the issue of granting working capital adjustment back to the file of AO with a direction to verify calculation of working capital adjustment and grant the same after affording adequate opportunity to the assessee. In the result ground, no four of the appeal of the revenue is dismissed.
15. In the result, appeal of the revenue (ITA No 2731/Del/2009) is partly allowed.
 16. Now we come to the appeal of the assessee in ITA No 203/Del/2009.
 17. The first ground of appeal of the assessee is general in nature and therefore it is dismissed.
 18. Second and third ground of the appeal of the assessee is against confirmation of addition of Rs 29,140,738/- on account of ALP of import of finished goods and rejecting gross margin analysis undertaken by the appellant for determining ALP of its international transactions of Import of finished goods.
 19. Against these grounds during the course of hearing, the assessee advanced no separate arguments. Therefore, these grounds are dismissed.
 20. Fourth ground of the appeal of the assessee is against the inadequate deduction for startup cost incurred by the appellant while computing the ALP.
 21. As we have already decided the ground no 3 of the appeal of the revenue where we have set aside the issue of deduction of startup cost while calculating ALP to the file of the CIT (A), this ground of appeal of the assessee is also similarly set aside to the file of CIT (A) to be adjudicated afresh after affording reasonable opportunity to the appellant to put forth its claim. In the result ground, no four of the appeal of the assessee is allowed accordingly.
 22. Ground No 5 of the appeal of the assessee is against not granting appellant the benefit of downward variation of 5 % in determining ALP

wherein CIT (A) has held that adjustment of $\pm 5\%$ is not a standard deduction.

23. No separate arguments were put forward before us on this ground and therefore it is dismissed.
24. Ground No 6 of the appeal of the assessee was against charging of interest u/s 234B of the Act. No separate arguments were put forward before us on this ground and as charging of 234B interest is consequential, therefore it is dismissed.
25. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 21.01.2016.

-Sd/-

**(I.C. SUDHIR)
JUDICIAL MEMBER**

-Sd/-

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

Dated: 21/01/2016
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi