

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

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA No.3037/Mum/2012
(Assessment Year 2006-07)

The ACIT, Cen.Cir.25,
R.No.404, 4th Floor,
Aaykar Bhavan,M.K.Road,
Mumbai 400 020

..... Appellant

Vs.

M/s. Patel Engineering Ltd.
Patel Estate, S.v.Road,
Jogeshwari (West),
Mumbai 400 058
PAN: AAACP 2567L

.... Respondent

Appellant by : Shri N.Padmanabhan
Respondent by : Shri Mayur Kishnadwala
Date of hearing : 25/08/2016
Date of pronouncement : 13/01/2017

ORDER

PER G.S.PANNU,A.M:

The captioned appeal filed by the assessee pertaining to assessment year 2006-07 is directed against an order passed by CIT(A)-15, Mumbai dated 21/02/2012, which in turn, arises out of an order passed by the Assessing Officer under section 144C(3) r.w.s. 147 of the Income Tax Act, 1961 (in short 'the Act') dated 02/02/2011.

2. In this appeal the Revenue has raised the following Ground of appeal:-

“a. On the facts and circumstances of the case and in law, the Ld.CIT(A) erred in holding that adjustment arrived at by the Transfer Pricing Officer in respect of notional interest is not justifiable and directed the said adjustment to be deleted.”

3. The grievance of the Revenue in this appeal is with respect to the action of the CIT(A) in holding that addition of Rs.78,48,476/- made by the Assessing Officer on account of the transfer pricing adjustment is not maintainable. Briefly put, the facts relevant to appreciate the controversy in this appeal can be summarized as follows. The respondent assessee is a company incorporated under the provisions of the Companies Act, 1956 and is inter-alia engaged in the business of Civil Contracting Projects like dams, tunnels, industrial complexes, building roads etc. It was noticed by the Assessing Officer that during the year under consideration assessee was in receipt of a sum of Rs.11,18,88,600/- from its wholly owned subsidiary Patel Engg. Inc(in short 'PEI'). The aforesaid amount represented a sum of US \$27,00,000 remitted by PEI for buy-back of shares held by the assessee in PEI @ US \$20.35 per share. Since it was an international transaction within the meaning of section 92B of the Act, the Assessing Officer referred the matter to the Transfer Pricing Officer under section 92CA(1) of the Act. The Transfer Pricing Officer vide order dated 30/10/2009 passed under section 92CA(3) proposing an adjustment of Rs.78,48,476/-.

3.1 During the year under consideration, the subsidiary of the assessee PEI decided to reduce its share capital and accordingly undertook buy-back of the equity shares held by the assessee @ US \$ 20.35 per shares. The background of the transaction is that somewhere in 1997, assessee decided to explore business opportunity in USA and accordingly, acquired 1,22,846 shares of ASI

RCC Inc. USA for a consideration of US \$20.35 per share totalling to US \$25,00,000 (equivalent to INR 9,73,25,475/-). The said concern was engaged in the business of general contractor focussing on Roller compacted concrete dam construction, renovation and also provided construction management services for project in foreign countries. In 1999, assessee decided to restructure its US operations by forming a holding company in USA and accordingly PEI was incorporated. The assessee made equity investments in PEI, its 100% subsidiary. As part of the restructuring plan, the shares of PEI were subscribed by the assessee at USD 20.35 per share and in-turn PEI invested the sum in acquiring control over ASI RCC Inc.USA at the same rate i.e. US \$ 20.35. During the year under consideration, ASI RCC Inc. USA was having excess funds and, therefore, it redeemed the preference shares held by PEI. On account of availability of funds due to redemption of preferred stock by ASI RCC Inc. USA, PEI used such funds to reduce its share capital and accordingly, bought-back its equity shares held by the assessee @ US \$ 20.35 per share. In this manner PEI remitted the impugned funds to assessee company as return of equity.

3.2 On being show-caused by the Transfer Pricing Officer, assessee pointed out that the Net Asset Value (NAV) of PEI was negative and, therefore, the buy-back of shares at a price not less than US \$ 20.35 per share was at arm's length price. The Transfer Pricing Officer considered the entire transaction as a means by which assessee company had provided accommodation to its US subsidiary in the form of providing the fund by way of equity and that such an accommodation was without adequate consideration. In fact, the Transfer Pricing Officer notes that the entire transaction '*can be viewed as sham*

transaction' and that *'the assessee has not brought any new facts to convince the genuineness of the investment in the form of shares'*. The Transfer Pricing Officer went on to hold *'that such arrangement on transaction was nothing but interest-free advance of the funds to the US subsidiary'*, therefore, according to the Transfer Pricing Officer in an arm's length scenario assessee was entailed to earn interest on the funds provided to its US subsidiary. The Transfer Pricing Officer noted that with respect to certain other amount advanced to the ASI RCC Inc. USA as a loan, assessee had earned interest @ 6.75% and he adopted the same rate as arm's length rate and computed interest of Rs.78,48,476/- on the impugned sum for the instant year calculated upto the date on which the amount was remitted to the assessee. The Assessing Officer has passed an order making an addition of Rs. 78,48,476/- to the returned income in conformity with the adjustment proposed by the Transfer Pricing Officer.

3.3 Before CIT(A), assessee placed reliance on the material submitted to the Transfer Pricing Officer during the proceedings under section 92CA of the Act and also reiterated the stand taken before the Transfer Pricing Officer. The CIT(A) noted fallacy in the approach of the Transfer Pricing Officer and came to conclude that the adjustment arrived at by the Transfer Pricing Officer on account of notional interest was not justified. According to the CIT(A) Transfer Pricing Officer was wrong in assuming the instant transaction as advancement of interest free loan to the subsidiary and imputation of notional interest and that too only for the year under consideration upto the date of remittance, considering that the investment in shares of PEI had been made by the assessee in the past years. The CIT(A) has also noted that the Transfer Pricing

Officer had not disputed the valuation of the shares of the subsidiary either at the time of its acquisition by the assessee in the past years or even during the year at the time of buy-back of shares by PEI. The order of the CIT(A) directing the deletion of the addition of Rs.78,48,476/- has been challenged before us.

3.4 As the canvassed Ground of appeal raised by the Revenue shows that no specific point has been raised to assail the finding of the CIT(A). Nevertheless, at the time of hearing, the Ld. Departmental Representative contended that the matter be restored back to the file of the Assessing Officer /Transfer Pricing Officer for examining afresh the value adopted by the subsidiary PEI to buy-back the shares as to whether the same was at an arm's length price or not.

3.5 On the other hand, Ld. Representative for the assessee pointed out that the CIT(A) had made no mistake in deleting the addition because the action of the Transfer Pricing Officer was without jurisdiction. It was pointed out that the transaction was clearly of investment in shares, which has been returned on account of buy-back of shares by investee concern and therefore, it could not have been treated as a loan transaction so as to impute any notional interest thereof. In the course of hearing, Ld. Representative for the assessee placed reliance on the following decisions to submit that the action of the Transfer Pricing Officer was unwarranted and the CIT(A) was justified in deleting the addition:-

- (i) Aegis Ltd. vs. Addl. CIT , ITA No.1213/Mum/2014, A.Y. 2009-10
Dated 27/07/2015.
- (ii) DIT v. Besix Kier Dabhol SA, 26 taxmann.com 169 (Bom)
- (iii) Aditya Birla Minacs Worldwide Ltd. DCIT,
56 taxmann.com, 317 (Mum-Trib)2015

- (iv) Parle Biscuits (P) Ltd. vs. DCIT, 46 taxmann.com 11
(Mum-Trib) 2014
- (v) DCIT v. Vikaas Oberoi 37 taxmann.com 46
(Mum-Trib) 2014
- (vi) Alcargo Global Logistics Ltd. vs. ACT,
ITA Nos. 4909 & 4910/Mum/2012, dated 11/06/2014.

4. We have carefully considered the rival submissions. The factual matrix has been appropriately noticed by us in the earlier paras and is not being repeated for the sake of brevity. So however, the fact-situation which clearly stands out is that assessee company had invested in the equity shares of its subsidiary in USA in the past years and during the year under consideration, the subsidiary has undertaken redemption of share capital by buy-back of the equity shares held by the assessee. The investment by the assessee in the equity shares of the subsidiary was undertaken in the past @ US \$20.35 per share and during the year under consideration the subsidiary has undertaken buy-back at the same rate i.e. uS \$20.35 per shares. The nature of the said transaction has been disbelieved by the Transfer Pricing Officer, who has re-characterized it as provision of loan/fund by the assessee to its subsidiary on interest-free basis in the garb of investment in equity of the subsidiary. It is a trite law that the transfer pricing proceedings do not envisage empowering of the Transfer Pricing Officer to re-characterize the transactions on the basis of his own whims and fancies. In the present case, the CIT(A) has correctly brought out that the transactions of investment and buy-back of shares has been spread over more than one year and that there was no material to suggest that the stated transactions were unreal.

4.1 Even with regard to the value at which the buy-back of shares has been undertaken by the investee subsidiary company, the CIT(A) noted that the valuation of shares has not been disputed by the Transfer Pricing Officer during the proceedings before him. In fact, the CIT(A) has categorically observed that the Transfer Pricing Officer in his order has observed the per share price of the shares as reflected in the Balance Sheet of the assessee for the various years. On this point, we also note that before the Transfer Pricing Officer, assessee had given justification of the buy-back price by pointing-up the NAV of the investee company on the date of buy-back, which was much lower than buy-back price. We find nothing adverse on such assertions of the assessee. Therefore, under these circumstances, in our view, the CIT(A) has made no mistake in deleting the addition.

4.2 On the issue of as to whether the Transfer Pricing Officer is competent to re-characterize a tested transaction, the Ld. Representative for the assessee had placed reliance on the judgment of Hon'ble Bombay High Court in the case of Besix Kier Dabhol SA(supra) The assessee before the Hon'ble Bombay High Court was a non-resident company, whose equity capital was jointly owned by the two joint venture partners in a certain ratio. Apart from receipt of capital, assessee company had also raised loans from the two equity holders on which interest was paid. The Revenue disallowed the payment of interest on the ground that such raising of loan was also to be viewed as raising of equity and, therefore, interest was disallowable. The Tribunal disagreed with the stand of the Revenue and noted that there was no provision under the Act by which equity could be re-characterized into debt and vice-versa. The Tribunal also noted that at the relevant point of time there were no rules with regard to

thin capitalization so as to consider the debt as equity and that such a proposal was only part of Direct Taxes Code Bill of 2010 as a part of General Anti Avoidance Rules (GAAR) and that in the absence of any such statutory provision the stand of the Revenue could not be upheld. The aforesaid reasoning has been approved by the Hon'ble Bombay High Court. In our considered opinion, the ratio of the reasoning approved by the Hon'ble Bombay High Court in the case of Besix Kier Dabhol SA (supra) clearly militates against the action of the Transfer Pricing Officer in re-characterizing the transaction of investment in the equity shares of the subsidiary as a loan transaction in the instant case. To the similar effect are the decisions of the Mumbai Tribunal relied upon by the assessee before us. Therefore, in our view, the stand of the Transfer Pricing Officer has been rightly negated by the CIT(A).

4.3 Before parting, we refer to the argument set-up by the Ld. Departmental Representative that the matter of valuation of shares be examined afresh by the Transfer Pricing Officer as per the Discounted Cash Flow(DCF) method and in this context, he referred to the decision of the Chennai Bench of the Tribunal in the case of M/s. Ascendas (India) Pvt. Ltd. vs. DCIT, in ITA No.1460/Mds/2012 dated 12/03/2013, wherein reference to such a method has been made. In our considered opinion, the plea of the Ld. Departmental Representative is quite misconceived and if it is to be accepted, then it would result in unnecessary prolonging of litigation. We say so for the reason that at the stage of transfer pricing proceedings before the Transfer Pricing Officer, assessee has in a detailed manner furnished the justification of the value at which shares have been bought back by the investee company. In fact, the

replies of the assessee have been reproduced by the Transfer Pricing Officer in his order, wherein not-only the various methodologies of valuation have been pointed out but even the respective values have also been brought out. Further, none of the same have been controverted by the Transfer Pricing Officer in his order and in fact the CIT(A) has specifically concluded that the valuation of shares has not been disputed by the Transfer Pricing Officer *“either at the time of acquisition by the appellant or at the time of sale.”* The CIT(A) has thereafter goes on to hold that *“the TPO in the facts of the case has not disputed the ALP of this international transaction i.e. he has not disputed the valuation of the shares done by the appellant and submitted to the Transfer Pricing Officer”*

4.4 In view of the aforesaid undisputed fact-position, remanding of the matter back to the Assessing Officer/Transfer Pricing Officer, as suggested by the Ld. Departmental Representative, will amount to travesty of justice and lead to prolonging the litigation, which ought to be avoided. Thus, we find no force in the argument of the Ld. Departmental Representative, which is hereby rejected.

5. Resultantly, appeal of the Revenue is dismissed.

Order pronounced in the open court on 13/01/2017

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(G.S. PANNU)
ACCOCUNTANT MEMBER

Mumbai, Dated 13/01/2017
Vm, Sr. PS

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai