

**आयकर अपीलीय अधिकरण, मुंबई “के” खंडपीठ**  
**Income-tax Appellate Tribunal -“K”Bench Mumbai**  
**सर्वश्री राजेन्द्र,लेखा सदस्य एवं, शक्तिजीत डे, न्यायिक सदस्य**  
**Before S/Shri Rajendra,Accountant Member and Saktijit Dey,Judicial Member**  
**आयकर अपील सं/ ITA No.1573/Mum/2011 : निर्धारण वर्ष/Assessment Year-2004-05**

Income tax Officer-5(2)(4) Room No.571, 5 <sup>th</sup> Floor Aayakar Bhavan, M.K. Road Mumbai-400 020.	Vs.	M/s. Marsh India Pvt. Ltd. Peninsula Corporate Park 902, Tower 1, Ganpatrao Kadam Marg Lower Parel, Mumbai-400 013. <b>PAN:AADCM 4220 G</b>
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**(Appellant)**

**(Respondent)**

**Revenue by: Shri N.K. Chand-CIT**

**Assessee by: Shri Nishant Thakkar**

**सुनवाई की तारीख / Date of Hearing: 27.09.2016**

**घोषणा की तारीख / Date of Pronouncement: 05.10.2016**

**आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश**

**Order u/s.254(1)of the Income-tax Act,1961(Act)**

**लेखा सदस्य, राजेन्द्र के अनुसार/ PER Rajendra A.M.-**

Challenging the orders dated 10.12.2010 of the CIT(A)- 15,Mumbai,the Assessing Officer (AO)has filed present appeal.Assessee-company,engaged in the business of insurance broking,reinsurance-broking,risk management and insurance programme management services for businesses,public entitites,insurance companies, associations, professional services organisa - tion and private clients,filed its return of income on 31.10.2004,declaring total Loss at Rs.1,75,28,794/-.The AO completed the assessment u/s.143(3) on 22.12.2006, determining its loss at Rs.98.74 lakhs.

**2.**First Ground of appeal is about deleting the disallowance of Income tax on expatriate salary, amounting to Rs.43.24 lakhs. During the assessment proceedings,the AO found that the assessee had borne Income tax of Rs.49,39,525/- in respect of expatriate's salary, that on its own it had disallowed Rs.6.15 lakhs u/s.40(a)(v) of the Act, that disallowance was made by it for non monetary perquisites.The AO directed the assessee to file explanation with regard to the remaining amount. After considering the submission of the assessee,the AO held that Income tax paid on behalf of expatriate's salary could not be allowed. Finally.he made a disallowance of Rs.43,24,288/-.

**2.1.**Aggrieved by the order of the AO the assessee preferred an appeal before the First Appellate Authority (FAA). Before him,it was argued that the assessee had borne Income tax in respect of salary paid to William Jones (WJ), that the said expenditure was in terms of

employment agreement entered into with WJ, that the tax borne by the assessee had been offered for tax as part of perquisite by WJ in his assessment records, that tax on non monetary perquisites could be disallowed. After considering the submission of the assessee and the assessment order, the FAA held that the assessee had borne the Income tax of WJ as per the terms of employment agreement that it was in the nature of salary/employment cost to the company that was otherwise allowable as a deduction, that the tax borne by the company.

**2.2.** Before us, the Departmental Representative (DR) supported the order of the AO and referred to the provisions of section 10(e)(e) of the Act. The Authorised Representative (AR) stated that WJ had offered the amount in question for taxation, the assessee itself had made the disallowance of Rs.6.24 lakhs. He also referred to Form No.16 of WJ.

**2.3.** We have heard the rival submissions and perused the material before us. We find that the assessee had paid income-tax in respect of salary paid to WJ as per the employment agreement, that it had suo motu made a disallowance for non-monetary perquisites, that WJ had offered the disputed amounts in his return of income. Considering the fact that WJ had paid the tax on the amount in question, we are of the opinion that the order of the FAA needs no interference whatsoever, upholding his order Ground No.1 is decided against the AO.

**3.** Second Ground of appeal is with regard to deletion of club membership fee amounting to Rs.3.24 lakhs. During the assessment proceedings, it was found that the amount was paid towards membership fee of Willingdon Sports Club and Breach Candy Swimming Bath Trust by the assessee. The AO held that the membership fee paid towards the club by the assessee company was capital in nature as it was the first year of revenue generation, that it was going to bring enduring benefit to the assessee for years to come. He made a disallowance of Rs. 3.24 lakhs.

**3.1.** During the appellate proceedings the FAA, relying upon the judgment of Jurisdictional High Court in the case of OTIS Elevators Co. (I) (195ITR682) held that expenditure incurred by the assessee was wholly and exclusively for the purpose of business. He allowed the appeal filed by the assessee.

**3.2.** Before us, the DR supported the order of the AO. The AR relied upon the case of United Glass Mfg. Co. Ltd. (Civil Appeal No.6447 of 2012 dt.12.9.12 of the Supreme Court).

**3.3.**After hearing the rival submissions we find that the Hon'ble Apex Court,in the case of United Glass Mfg. Co. Ltd.(supra),has held that club membership fees incurred by an assessee is a business expenditure and has to be allowed as per provisions of section 37 of the Act. Respectfully following the above judgement Ground No.2 is decided against the AO.

**4.**Ground No.3 is about Transfer Pricing (TP).During the assessment proceedings the AO noted that the assessee had entered into International Transactions (IT)with its Associate Enterprise(AE).He directed it to justify the TP study and prove that the transactions were at Arm's Length Price (ALP).Vide its letter,dt.7.12.2006, the assessee stated that company's OP/TC ratio was 28.28% as against the mean of comparable company (24.02%).The AO held that while calculating ratio the assessee had taken advisory fee at Rs.59.99 lakhs, that as per audit report advisory fee was Rs.86.36 lakhs.He asked the assessee to show cause the basis of taking advisory fee at Rs.59.99 lakhs and to explain as to why two different TP methods had been used for different AE.s in respect of advisory fee. Vide its letter dt.7.12.2006 the assessee computed the mean as under :-

<b>Comparable Companies</b>	<b>Adjusted OP/TC</b>
Geojit Financial Services Ltd.	57.39%
Integrated Enterprises (India) Ltd.	21.16%
Keynote Corporate Services Ltd.	-2.61%
S K P Securities Ltd.	69.57%
VCK Capital Market Services Ltd.	-25.40%
<b>Mean</b>	<b>24.02%</b>

**4.1.**After considering the submission of the assessee the AO held that out of the five comparables two were loss making and had no connection with the line of business. He reworked the comparable mean of adjusted OP/TC ratio as under :-

<b>Company Name</b>	<b>Individual Company Mean</b>
Geojit Financial Services Ltd.	57.39%
Integrated Enterprises (India) Ltd.	21.16%
S K P Securities Ltd.	69.57%
<b>Mean</b>	<b>49.37%</b>

He applied the rate of 49.37% as ALP on the total cost as against 28.28% percent. As a result following adjustment was made.

<b>Particulars</b>	<b>Amount(Rs.)</b>
Total operating cost(as per assessee's letter dated 21.12. 06)	64,42,528
Add: Arm's length return on total cost @ 49.37	31,80,725
Arm's length price of advisory fees	96,23,353
ALP after considering 5% range as per proviso to section 92C(2) of the Act.	91,42,185
Less: Actual Advisory fee as per para 4.4(b)	82,64,583
<b>Adjustment</b>	<b>8,77,602</b>

4.2. During the appellate proceedings the assessee argued that the inclusion of loss making company in the distribution curve was just as normal as the inclusion of company that were extremely profitable, that the AO had wrongly excluded the loss making companies holding that those were nowhere near to assessee's line of business, that the loss making companies were in the same business, that the net worth of both the loss making company's was positive. After considering the submission of the assessee and the assessment order the FAA held that VCK and Keynote Corporate i.e. the loss making company's were functionally similar to the assessee, that they had incurred a loss during a year, that their network remained positive, that the inclusion of loss making companies in the distribution curve was normal. Finally he deleted the addition made by the AO.

5. Before us, DR stated that the companies were constantly making losses, that same could not be selected as comparables. He referred to the case of Affinity Express India Pvt. Ltd. (ITA No.106/PN/2012-assessment year-2004-05 dt.09.03.16). The AR supported the order of the FAA. On a specific query by the Bench, the AR stated that both the companies were suffering losses in the earlier years as well as in the current year.

6. We have heard the rival submission and perused the material before us. We find that the AO had made adjustment as the assessee had included loss making entities in the comparables list, that the FAA had ignored the fact that two of the five comparables were showing loss, that he emphasised on net worth of the company rather than the losses suffered by the companies, that both the companies were suffering losses for continuously three years. In our opinion the AO was justified in excluding the constant loss making entities from the list of comparables. Therefore, reversing the order of the FAA Ground No.3 is decided in favour of the AO.

As a result appeal filed by the AO stands partly allowed.

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील अंशतः मंजूर की जाती है.

Order pronounced in the open court on 5<sup>th</sup> October, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 05 अक्टूबर, 2016 को की गई।

Sd/-

(शक्तिजीत डे / Saktijit Dey)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 05. 10.2016.

Jv.Sr.PS.

Sd/-

(राजेन्द्र / Rajendra)

लेखा सदस्य / ACCOUNTANT MEMBER

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

- 1.Appellant /अपीलार्थी
2. Respondent /प्रत्यर्थी
- 3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, 4.The concerned CIT /संबद्ध आयकर आयुक्त
- 5.DR "K " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
- 6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**  
उप/सहायक पंजीकार **Dy./Asst. Registrar**  
आयकर अपीलीय अधिकरण, मुंबई /**ITAT, Mumbai.**