

**IN THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai**

**Before Shri B. Ramakotaiah, Accountant Member
and Shri Amit Shukla, Judicial Member**

ITA Nos.5401/Mum/2012 & 7230/Mum/2011
(Assessment year: 2007-08)

Nomura Services India (P) Ltd., (formerly known as M/s Lehman Brothers Services India Pvt. Ltd) 10 th Floor, Nomura, Off High Street, Hiranandani Business Park, Powai, Mumbai 400076 PAN: AABCL 0053 C (Appellant)	Vs.	Income Tax Officer, 10(3)-2, Aayakar Bhavan, M.K. Road, Mumbai 400020 (Respondent)
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Assessee by:	Shri Percy Pardiwala & Shri Nishant Thakkar
Department by:	Shri Ajeet Kumar Jain, DR
Date of Hearing:	08/11/2012
Date of Pronouncement:	16/11/2012

ORDER

Per Bench:

These two appeals are by assessee for the assessment year 2007-08. The appeal in ITA No.7230/Mum/2011 is in Form 36B against the orders of the DRP and AO passed under section 143(3) r.w.s. 144C in pursuance of the directions of the DRP. Appeal in ITA No.5401/Mum/2012 is in Form 36 against the order of the CIT (A) dismissing the appeal preferred by assessee against the order under section 143(3) dated 19.08.2011 (r.w.s. 144C) as not maintainable.

2. Briefly stated, assessee filed return of income on 31.10.2007 declaring an income at ₹.3,27,225/-. Assessee formerly known as Lehman Brothers Services India Pvt. Ltd is a company incorporated in India and is engaged in business of software development & ITES

and has claimed deduction under section 10A. During the year the international transactions entered into by assessee with its associate enterprises (AE) were more than ₹.15.00 crores. A reference was made under section 92CA(1) to the Transfer Pricing Officer (TPO) and order under section 92CA(3) dated 20.09.2010 has been received by AO from the Additional CIT, Transfer Pricing II (3). Thereafter the draft order was passed under section 144C(1) r.w.s. 143(3) with an intimation to assessee to file necessary objections, if any before the DRP. Assessee filed its application on 23.12.2010 in Form 35A which was rejected by the DRP vide its order dated 04.07.2011. Thereafter AO completed the assessment under section 143(3) r.w.s. 144C warranting transfer pricing adjustment of ₹.18,18,88,479/- as per the order of the TPO under section 92CA(3). Since the DRP rejected the application *suo moto* as *non-est*, and not maintainable *ab initio*, Assessee preferred appeal to the CIT (A) as per the provisions. The CIT (A) noticing that the DRP rejected and dismissed the objections as invalid, *non est* and dismissed *limine* however, was of the view that the appeal is not maintainable as the order was passed pursuant to the order/directions of the DRP. Against these two sets of orders of the DRP and the CIT (A) assessee preferred present two appeals.

3. We have heard the learned Counsel and the learned DR in detail. After considering the rival contentions and examining the orders on record, we are of the opinion that both the authorities have rejected assessee's contentions without any valid reasons. First of all, we will deal with the rejection of objections filed before the DRP.

4. DRP vide order dated 04.07.2011 has mentioned that vide Para-2 that it has seen during the DRP proceedings that Form No.35A of the assessee company which is resident Indian Private Limited Company was signed by one Mr. Brijesh Ahuja on behalf of

assessee. Assessee was asked to explain the same and establish the status of Shri Brijesh Ahuja vis-à-vis the assessee company in terms of the provisions of section 140C which section prescribed as who should sign the return of income etc., Thereafter vide Para 2.2.1 the DRP notes as under:

“2.2.1. By its reply received on 27.06.2011, Authorized Representative of the assessee company have filed photo copies of certain documents which are unauthenticated. As per these copies, it is seen that the document is stated to be a certified true copy of the resolution passed by the Board of Directors of Nomura Services India Private Limited at the meeting held on April 24, 2009 by which the Board of Directors authorized Shri Brijesh Ahuja among others to prepare, sign, furnish and file income and other tax return.... Etc. The document however, does not state the specific circumstances under which the Board of Directors is compelled to authorize Shri Brijesh Ahuja to sign the Income tax returns among other documents. In view of this, the assessee company’s Form No.35A is not in compliance with the relevant provision of section 140(c) which is reproduced as under:

Extract of section 140(c):

“In the case of a company, by managing director thereof, or where for any unavoidable reason such managing director is not able to sign and verify the return, or where there is no managing director by any director thereof: (Provided that where the company is not resident in India, the return may be signed and verified by a person who holds a valid power of attorney from such company to do so, which shall be attached to the return)”

It is in this background that the validity of assessee’s Form No.35A is to be considered”

5. Thereafter it records that the proceedings before the DRP are continuation proceedings and records the following in Para 2.2.2:

“2.2.2 In this respect, in the first place the DRP finds that the proceedings before it being only an extension of the proceedings before AO, the binding obligations with regard to signing of returns to be filed with AO are equally binding on the forms and papers filed before the DRP. Seen on this template, the unavoidable reasons for the authorization in the case having been not articulated

either in the assessee company's board's resolution or in Form No.35A, the authorization issued by assessee to Mr. Brijesh Ahuja is not in conformity with the provisions and requirements mandated by section 140(c) as applying to verification in Form No.35A)".

6. Further in the later Paras running from 2.2.2 to 2.2.10 the DRP went on discussing the modalities for signing the return, application of section 277, application of section 140 and makes elaborate discussion including explanation to section 139(9) and concludes as under:

"3. For reasons discussed in detail supra, the impugned form No.35A and its enclosures cannot be considered valid in law. Non compliance with the statutory provisions of section 140(c) and violation of these provisions clearly render the documents filed in violation of the provisions as invalid and illegal. In the facts and circumstances of the case, it is held that since the DRP memo inform No.35A, its accompanying statement of facts and grounds of appeal have not been verified as required by law, the said document in Form No.35A is an invalid document, devoid of any sanctity in the eyes of law and cannot be proceeded with.

4. As discussed supra, Form No.35A filed by the assessee company is not valid. In view thereof, Form No.35A filed by assessee is held to be invalid, 'non-est' and dismissed in limine"

7. By concluding the above the DRP rejected the objections filed by assessee as *non-est* and dismissed the same *in limine*.

8. We are surprised to note that three Commissioners of Incometax constituting the DRP does not follow the Rules under which the DRP is functioning. By a notification No.84/2009 (S.O 2958(E)/F.No.142 /22/2009-TPL) dated 20.11.2009, in exercise of the powers conferred by sub-section 14 of section 144C, the CBDT had issued Rules to regulate the procedure of Dispute Resolution Panel. Rule-4 for filing objections is as under:

"Procedure for filing objections:

4(1). *The objections if any, of the eligible assessee to the draft order may be filed in person or through his agent within the specified period in Form No.35A.*

(2) *The objections referred to in sub-rule (1) shall be in English and presented to the Secretariat of the panel.*

(3) *The objections shall be filed in paper book form in quadruplicate duly accompanied by-*

(a) *four copies of the draft order duly authenticated by the eligible assessee or his Authorized Representative.*

Provided *that in the case of draft assessment under sub-section (3) of section 143 read with section 144A, the objections shall also be accompanied by four copies of the directions issued by the Joint Commissioner or Additional commissioner under section 144A and in the case of draft assessment under sub-section (3) of section 143 read with section 147, the objections shall also be accompanied by four copies of the original assessment order, if any:*

Provided *further that the panel may in its discretion either accept the objections which are not accompanied by all or any of the documents referred to above or reject it.*

(b) *the evidence, if any, the eligible assessee intends to rely upon including any document or statement or paper submitted to assessing officer:*

Provided *that where the eligible assessee intends to rely upon any additional evidence other than those submitted to AO, such additional evidence shall not form part of the paper book but may be filed along with a separate application stating the reasons for filing such additional evidence shall not form part of the paper book but may be filed along with a separate application stating the reasons for filing such additional evidence”.*

9. As can be seen from the above Rule, objections, if any may be filed in person or through his agent within the specified period in Form 35A. There is no prescription that the objection should be filed by assessee in person. An agent is permitted to file the objection, but in the case of company whether the agent should be a Managing Director/ Director, Chartered Accountant or any other person has not been prescribed under the Rules. Rule 3(a) even

specifies that draft order copies can be duly authenticated by the eligible assessee or his Authorized Representative. The proviso further empowers DRP to accept objections without accompanying documents or reject. Therefore, the observations of the DRP that Form 35A has not been signed by assessee Managing Director or Director is not correct, in view of the specific rule which permits an agent to file the objections. Further it is to be noted that these rules are subordinate rules prescribed for regulating the procedure and issued by the CBDT. Once the CBDT decides that an Agent also is permitted to file objections, we are unable to understand why the DRP has taken recourse to section 140 to state that Form No.35A (which is a non statutory form) should also follow the provisions as prescribed as that of a return of income.

10. With regard to the provisions of section 140, section 140 of the Income Tax Act prescribes who should sign the return and the said provision is as under:

“140. The return under section 115WD or section 139 shall be signed and verified—

[(a) in the case of an individual,—

(i) by the individual himself;

(ii) where he is absent from India, by the individual himself or by some person duly authorized by him in this behalf;

(iii) where he is mentally incapacitated from attending to his affairs, by his guardian or any other person competent to act on his behalf; and

(iv) where, for any other reason, it is not possible for the individual to sign the return, by any person duly authorized by him in this behalf:

Provided that in a case referred to in sub-clause (ii) or sub-clause (iv), the person signing the return holds a

valid power of attorney from the individual to do so, which shall be attached to the return;]

- (b) *in the case of a Hindu undivided family, by the karta, and, where the karta is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family;*
- (c) **in the case of a company, by the managing director thereof, or where for any unavoidable reason such managing director is not able to sign and verify the return, or where there is no managing director, by any director thereof :**

[Provided that where the company is not resident in India, the return may be signed and verified by a person who holds a valid power of attorney from such company to do so, which shall be attached to the return⁷ :

Provided further that,—

- (a) **where the company is being wound up, whether under the orders of a court or otherwise, or where any person has been appointed as the receiver of any assets of the company, the return shall be signed and verified by the liquidator referred to in sub-section (1) of section 178;**
- (b) **where the management of the company has been taken over by the Central Government or any State Government under any law, the return of the company shall be signed and verified by the principal officer thereof;]**
- (cc) *in the case of a firm, by the managing partner thereof, or where for any unavoidable reason such managing partner is not able to sign and verify the return, or where there is no managing partner as such, by any partner thereof, not being a minor;*
- (cd) *in the case of a limited liability partnership, by the designated partner thereof, or where for any unavoidable reason such designated partner is not able to sign and verify the return, or where there is no designated partner as such, by any partner thereof;]*

(d) in the case of a local authority, by the principal officer thereof;]

[(dd) in the case of a political party referred to in sub-section (4B) of section 139, by the chief executive officer of such party (whether such chief executive officer is known as secretary or by any other designation);]

(e) in the case of any other association, by any member of the association or the principal officer thereof; and

(f) in the case of any other person, by that person or by some person competent to act on his behalf.

(emphasis supplied.)

11. As can be seen the provisions of section 140 is applicable only for the return under section 115WD or section 139. It does not apply to any other forms or returns prescribed under other provisions of the statute unless made applicable specifically. Therefore, reliance on the DRP on provisions of section 140 which does not apply to Form No.35A prescribed under the Rules is itself wrong and in our view is only invoked by the DRP without realizing its limitations and jurisdiction, for the sake of rejecting the application.

12. Unlike Form No.36B which has various notes prescribed along with Form, Form No.35A does not have any notes. It only refers to the Rule 4(1) which enable the objections to be filed even through an agent. The order passed by the DRP, in our view is beyond the jurisdiction provided to that.

13. Even under the DRP Rules or under the provisions of the Act, the mandate to the DRP is to consider the objections on merit and give directions to AO with reference to the draft assessment order. Even this basic duty has not been performed by the DRP. It simply rejected Form No.35A filed by assessee as invalid, *non est* and dismissed *in limini*. On this count also the action of the DRP cannot be upheld and therefore, we are of the firm opinion that the order

passed on 04.07.2011 by the DRP panel-II is to be set aside with a direction to consider objections afresh and give necessary direction to AO as per the provisions of the Act and rules thereon. For this purpose, the matter is restored to the file of the DRP for consideration of the objections filed with it, afresh. As the matter is restored to DRP for considering objections on merit, we do not intend to decide the merits of the transfer pricing additions so proposed.

14. With these directions, appeal in ITA No.7230/Mum/2011 is considered allowed for statistical purposes.

ITA No. 5401/Mum/2012

15. As briefly stated above the CIT (A) rejected the appeal preferred by assessee by holding that the order was passed in pursuance to the order/directions of the Hon'ble DRP. Even this order of the CIT (A) is not factually correct. As discussed above in the above appeal, the DRP has not given any direction to AO on the proposed draft assessment order. It simply rejected the form 35A without giving any direction to AO. Therefore, the order of AO technically speaking is not covered by the directions of the DRP. Therefore, assessee had a right to appeal to the CIT (A) as per the Board Circular then issued. The CIT (A) erred in rejecting the appeal as not maintainable. The order of the CIT (A) cannot be sustained and therefore, has to be set aside.

16. However, since the matter was restored to the file of the DRP to the draft order stage in the above appeal No.7230/Mum/2011, we set aside the order of the CIT (A) along with the order of AO dated 19.8.2011 and restore the proceedings to the stage of the draft assessment order proposed by AO.

17. Assessee has a right to proceed either before the DRP or before the CIT (A). In the course of the arguments, assessee

preferred to go to the DRP. Therefore, proceedings are restored to the file of the DRP to consider the objections on merits and decide accordingly. Consequently, grounds in ITA No.5401/Mum/2012 are also considered allowed.

18. As assessee did not seek any costs, we are not levying any costs on DRP. We hope the DRP will follow the Rules and render justice for which it was conceived and constituted. In the result, both the appeals filed by assessee are considered 'allowed' for statistical purposes.

Order pronounced in the open court on 16th November, 2012.

Sd/-
(Amit Shukla)
Judicial Member

Sd/-
(B. Ramakotaiah)
Accountant Member

Mumbai, dated: 16th November, 2012.

Vnodan/sps

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The concerned CIT(A)*
4. *The concerned CIT*
5. *The DR, "K" Bench, ITAT, Mumbai*

By Order

Assistant Registrar
Income Tax Appellate Tribunal,
Mumbai Benches, MUMBAI