

**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, BENGALURU**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
and
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

IT(TP)A No.307/Bang/2016
(Assessment year: 2011-12)

M/s.Nuance Transcription Services India Pvt. Ltd.
I floor, Block B, Salarpuria Aura, Khata No.434/170
Marathahalli-Sarjapur Outer Ring Road,
Kaverappa Layout, Kadubeesanahalli,
Bengaluru-560103. ... Appellant
PAN:AAACF 3465 F

Vs.

Deputy Commissioner of Income-tax,
Circle 5(1)(1),
Bengaluru. ... Respondent

Appellant by : Shri Gaurav Gupta, CA
Respondent by : Shri G.R.Reddy, CIT(DR)

Date of hearing : 14/09/2017
Date of pronouncement : 28/11/2017

O R D E R

Per INTURI RAMA RAO, AM :

This is an appeal filed by the assessee directed against the assessment order passed by the Assessing Officer [AO] u/s 143(3) read with section 144C(13) of the Income Tax Act 1961 of the Income-tax Act,1961 [hereinafter referred to as 'the Act']of the Income-tax Act,1961 [hereinafter referred to as 'the Act'] for the assessment year 2011-12.

2. Brief facts of the case are that the assessee is a company duly incorporated under the provisions of the Companies Act 1956. It is engaged in the business of rendering of IT enabled Services. Return of income for the assessment year 2011-12 was filed on 23/11/2011 disclosing total income of Rs.11,15, 93,917/-. The AO noticed that the Assessee reported the following International Transactions (IT) in its report u/s 92E:

Nature of transaction	Amount	Method
Provision of IT Enabled Services	80,377,608	TNMM
Reimbursement of expenses	4,798,726	
Total	85,176,334	

Therefore, the AO referred the matter to the Transfer Pricing Officer [TPO] for the purpose of benchmarking the above International Transactions.

3. The, TPO, after going through the Transfer Pricing (TP) report submitted by the assessee- company noticed that the Assessee had outstanding debts from its Associated Enterprises exceeding 6 months for a sum of Rs.16,37,14,145/-. Therefore the TPO opined that debts outstanding for more than 6 months par take character of the loan. Therefore non-charging of interest requires ALP adjustment and applying the yield rate on B rate Bonds @ 13.46% on the outstanding debts exceeding 6 months suggested TP adjustment of under:

Arms Length Interest Rate	13.46% p.a.
Arms Length Price @ 13.46% p.a. on the outstanding receivables exceeding six months of Rs29,68,19,406/-	Rs.2,23,46,980 /-

TP Adjustment:

Arms Length Price of Extended Payment Terms	Rs. 2,23,46,980 /-
Price Charged	Rs. Nil
Adjustment u/s 92CA	Rs2,23,46,980 /-

4. The AO, after receipt of directions from the TPO passed draft assessment order dated 11/03/2015 u/s 143(3) incorporating the above TP adjustment and also allowed the benefit of section 10A after setting off of losses of Hyderabad STP unit against profit of Chennai unit and restricted the deduction u/s 10A by reducing expenditure incurred in foreign exchange on freight, insurance and telecommunication charges only from export turnover.

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5. Being aggrieved, assessee-company filed objections before the DRP contending *inter alia* that the AO was not justified in setting of losses of Hyderabad STP unit against profits of Chennai STPI unit and also contending that the TPO was not justified in reducing expenditure incurred on foreign travel and telecommunication in foreign currency only from export turnover and also contending that the transactions of receivables does not constitute International Transactions. The DRP, after considering the submissions, confirmed the finding of the TPO adjusting business loss of Hyderabad STP unit which is eligible for 10A against profits of 10A unit of Chennai.

5.1 As regards expenditure incurred in foreign currency on foreign travel, insurance etc., the DRP, following the decision of the Hon'ble jurisdictional High Court in the case of *CIT vs. Tata Elxsi* (349 ITR 98) directed for reducing the same both from export turnover as well as total turnover.

5.2 As regards ALP adjustments made on account of debts outstanding from Associated Enterprises for more than 6 months, DRP taking into consideration Explanation (i)(c) to Section 92B, which was inserted by the Finance Act 2012 with retrospective effect from 01/04/2002, held that it is international transaction and confirmed ALP adjustment.

6. Being aggrieved, assessee-company is in appeal before us raising the following grounds of appeal:

1. That on the facts and circumstances of the case and in law, the AO / Dispute Resolution Panel ("DRP") erred in assessing the total income of the Appellant at INR 13,82,97,270 as against the returned income of INR 11,15,93,917.
2. That on the facts and circumstances of the case and in law, the AO / DRP erred in holding that loss incurred by one STPI unit should be set-off against the profits of other STPI units before computing exemption under section 10A of the Act.

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3. That on the facts and circumstances of the case and in law, the AO erred in invoking the provisions of Chapter X of the Act, in relation to the transactions entered into by the STPI units, without appreciating that the income of such STPI units was exempt under section 10A of the Act, and therefore, there could not have been any erosion of tax revenue from India. Further, the DRP erred in upholding such an action of the AO.
4. That on the facts and circumstances of the case and in law, AO / DRP erred in not appreciating that the reference made by the AO to the TPO for determination of arm's length price was void ab-initio and bad in law as the AO failed to provide copy of approval granted by the Commissioner of Income-tax and affording any opportunity of being heard to the Appellant, in violation of the principles of natural justice.
5. That the AO / DRP / Transfer Pricing Officer ("TPO") erred on facts and circumstances of the case and in law in treating trade receivables amounting to INR 16,73,14,145, outstanding from the Associated Enterprises ("AE"), as an international transaction and re-characterizing the same as loan.
6. That on the facts and circumstances of the case and in law, the AO / DRP / TPO erred in arbitrarily adopting 13.46% as the rate of interest, which is excessive and unreasonable.
7. Without prejudice, the AO / DRP / TPO erred on facts and in law, while computing transfer pricing adjustment being notional interest for the entire year, without appreciating that the said trade receivables, amounting to INR 16,73,14,145, were wholly realized within a period of 3 months from March 31, 2011.
8. That the AO / DRP / TPO erred on facts and in law, in not providing the information obtained under section 133(6) of the Act, from CRISIL to the Appellant and not providing an opportunity of being heard in that regard or to rebut / cross-examine the same, thus the order passed under section 92CA of the Act and consequent order under section 143(3) read with section 144C of the Act, are bad in law.
9. That on the facts and circumstances of the case and in law, the AO erred in levying interest under section 234D of the Act.

Each of the above grounds is independent and without prejudice to the other grounds of appeal preferred by the Appellant.

The Appellant prays for leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal.

7. Ground No.1 does not require any adjudication as it is general in nature.

8. Ground Nos.2 and 3 challenge the action of the AO confirmed by the DRP in reducing loss of Hyderabad unit against Chennai unit. This issue is no longer *res integra*, as it is covered by the decision of the Hon'ble Supreme Court in the case of *CIT vs. Yokogawa India Ltd.*, (391

ITR 274) wherein it was held that deduction u/s 10A is qua the eligible under taking of the assessee standing on its own without reference to other eligible units or undertakings of the Assessee. Benefit of deduction u/s 10A is given to the undertaking and the deduction u/s 10A would be prior to the exercise to be undertaken under chapter IV for arriving at the total income of the Assessee. The relevant part of the judgment is as under:

“16. From a reading of the relevant provisions of Section 10A it is more than clear to us that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular No. 794 dated 9.8.2000 which states in paragraph 15.6 that,

"The export turnover and the total turnover for the purposes of sections 10A and 10B shall be of the undertaking located in specified zones or 100% Export Oriented Undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision."

17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No. 794 dated 09.08.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'."

In the light of the decision of the Hon'ble Apex Court in the case of *Yokogawa India Ltd.*, (supra), the grounds of appeal No.2 and 3 are allowed.

9. Ground number 4 was not pressed and hence dismissed as not pressed.

10. Ground No.5 challenges ALP adjustment on account of outstanding receivable from Associated Enterprises. Learned AR of the assessee vehemently contested that the transaction of outstanding receivables is not International Transaction as it is interlinked with transaction of sale. Reliance in this regard was placed on the co-ordinate bench decisions in the case of *Asst.CIT vs. M/s.Millipore (India) Ltd.*(IT(TP)A No.327/Bang/2015 dated 07/03/2017 and *M/s.Global e-business Operations Pvt. Ltd.,* in IT(IT)A No.172/Bang/2015 dated 21/04/2017. Both orders are authored by the Hon'ble Accountant Member.

On the other hand, the Id.CIT(DR) placed reliance on the orders of the lower authorities.

11. We heard rival submissions and perused material on record. The issue in this ground of appeal is whether transaction of allowing excess period of credit to Associated Enterprises without charging any interest during such credit period would amount to International Transaction within the meaning of section 92B of the Act. This issue is now covered by sub-clause (c) of clause (i) of Explanation to Section 92B inserted by the Finance Act 2012 wherein it was clarified that any receivables or any other debts arising during the course of business is International Transaction. The said clause (i) reads as under:

“Explanation. – *For the removal of doubts, it is hereby clarified that*

– (i) the expression ‘international transaction’ shall include –

(a).....

(b).....

(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;

.....”

This Explanation was inserted by the Finance Act 2012 needless to say that the purpose of Explanation in a statute is to clarify or explain or settle any doubt or ambiguity and controversy. This Explanation to

section 92B of the Act by the Finance Act 2012 though not in terms retrospective, serves as a Parliamentary exposition of the meaning of the word 'International Transaction' as used in un-amended section. It is trite law that Explanation, though not retrospective, was used as a Parliamentary exposition of its intent contained in the un-amended section (see *Manickam and Co. Vs. State of Tamil Nadu* (1977) 39 STC 12; AIR 1977 SC 519). This position was followed subsequently by the Hon'ble Apex Court in the case of *CIT vs. P.Doraiswamy Chetty* (183 ITR 559). The relevant para. of the judgment is extracted below:

"The second is Explanation 2 added to section 64 by the Finance Act, 1979, with effect from 1-4-1980. That Explanation says that: 'For the purpose of this section, 'income' includes 'loss'."

The third consideration is the decision of this Court in CIT v. J.H. Gotla [1985] 156 ITR 323/23 Taxman 14J, dealing with section 16(3), which has examined and evaluated the first two interpretative criteria. It appears to us that the answer to the question referred is covered by the pronouncement in J.H. Gotla's case (supra) and must need be in the affirmative and against the revenue.

In J.H. Gotla's case (supra), this Court said:

"...Therefore, where section 16(3) of the Act operates, the profit or loss from a business of the wife or minor child included in the total income of the assessee should be treated as the profit or loss from a 'business carried on by him' for the purpose of carrying forward and set off of such loss under section 24(2) of the Act.

On a consideration of the scheme of the Act and the provisions therein as noted before, the share income of the wife and minor children included in the assessee's total income under section 16(3) of the Act should be regarded as business income derived from business carried on by the assessee and, in that view of the matter, the assessee is entitled to set off his loss carried forward from the previous years." (p. 340).

The provisions dealt with in J.H. Gotla's case (supra) were, of course, the corresponding provisions of the 1922 Act. But the provisions of section 64(1)(i) are substantially the same and the exposition of the law under the relevant provisions of the 1922 Act must be held to govern the corresponding provision under the 1961 Act as well. Explanation 2 inserted in section 64 with effect from 1-4-1980, though not retrospective in its operation, serves as the legislative exposition of the import of section 64(1)(i). The Madhya Pradesh High Court in CIT v. Badri Prasad Agarwal [1983] 142 ITR 353 considered the effect of this legislative exposition and the learned Chief Justice, speaking for the Division Bench of the High Court, said:

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"...Speaking generally, subsequent legislation cannot be used for construction of an earlier statute but if an enactment is really ambiguous, subsequent legislation can be used as a parliamentary exposition of the former (see Craies on Statute Law, 7th Edn., pp. 147 and 148). This principle was recently applied by the Supreme Court in construing section 15(6) of the Central Sales Tax Act, as it stood before its amendment by Act No. 61 of 1972, and the amendment introduced by this Amending Act, though not retrospective, was used as a parliamentary exposition of its intent contained in the unamended section [see Manickam & Co. v. State of Tamil Nadu AIR 1977 SC 518]. The Explanation added in section 64 by the Finance Act, 1979, though not in terms retrospective serves as a parliamentary exposition of the meaning of the word 'income' as used in the unamended section, for, that word, in the context of section 64, was really ambiguous and had given rise to diverse meanings." (p. 355)

This view of the Madhya Pradesh High Court has been referred to with approval by this Court in J.H. Gotla's case (supra).

8. *This construction of the provision also commended itself to the Direct Tax Law Committee, 1978, which, in its final report, said:*

"The provisions for aggregating income of the spouse under clause (i) of section 64(1) has led to a dispute in regard to the treatment of losses which may fall to the share of the spouse from the partnership. The Gujarat High Court in Dayalbhai Madhavji Vadera v. CIT [1966] 60 ITR 551 has ruled that the section contemplates inclusion of income and, accordingly, the share of loss arising to the spouse cannot be set off against the total income of the other spouse. The Karnataka High Court in Kapadia v. CIT [1973] 87 ITR 511 has dissented from this view and has held that income in this section includes a loss. On general principles, income from membership in a firm would include a loss and the context of clause (i) of sub-section (1) does not warrant the contrary construction. The liability to assessment cannot alternate from year to year between the individual and the spouse depending on whether there is a profit or a loss...." [Emphasis supplied]

9. *We are in respectful agreement with the view taken in J.H. Gotla's case (supra) and are not persuaded to take a different view which the acceptance of the submissions of Dr. Gauri Shankar would require. Accordingly, we answer the question referred in the affirmative and against the revenue."*

Thus having regard to the above legal position, it should be construed that Explanation is deemed to have been there since inception of the section. The decisions of the co-ordinates bench relied upon by the learned AR of the assessee, had not considered the import of this amendment and also is based on premise of the co-ordinate bench of

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Mumbai in the case of *Patni Computer Systems vs. Dy.CIT* (135 ITD 398). The Hon'ble Bombay High Court has reversed the decision of the Tribunal in the case of *CIT vs. Patni Computer Systems Ltd.* (215 Taxman 108). Therefore, we hold that the transaction of receivables from Associated Enterprises is International Transaction and not charging interest for a period exceeding 6 months requires ALP adjustment. Therefore the grounds of appeal filed by the Assessee are dismissed.

12. Ground Nos. 5 & 6 challenges adoption of rate of interest @ 13.64% on receivables as excessive and unreasonable. We find from record that this ground was not raised before the lower authorities and does not emanate from the orders of the lower authorities hence dismissed as such.

13. Ground No.7 is part of ground No.5. For the reasons given therein, ground No.7 is also dismissed.

14. Ground No.8 is part of ground No.6 and hence dismissed as such.

15. Ground No.9 is consequential and does not require adjudication.

16. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 28th November, 2017

Sd/-
(SUNIL KUMAR YADAV)
JUDICIAL MEMBER

Place : Bengaluru.

Date : 28/11/2017

srinivasulu, sps

Copy to :

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sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

By order

Senior Private Secretary
Income-tax Appellate Tribunal
Bangalore