IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA

[Before Shri Satbeer Singh Godara, JM & Dr. A. L. Saini, AM]

I.T.A. No. 268/Kol/2017
Assessment Year: 2008-09

M/s. Lexmark International (India) Pvt. Ltd. (PAN: AAACL6752B)	Vs.	Deputy Commissioner of Income-tax, Circle-II, Kolkata.
Appellant		Respondent

&

I.T.A. No. 72/Kol/2016
Assessment Year: 2011-12

M/s. Lexmark International (India) Pvt. Ltd. (PAN: AAACL6752B)	Vs.	Deputy Commissioner of Income-tax, Circle-II, Kolkata.
Appellant		Respondent

&

I.T.A. No. 235/Kol/2017
Assessment Year: 2012-13

M/s. Lexmark International (India) Pvt. Ltd. (PAN: AAACL6752B)	Vs.	Assistant Commissioner of Income-tax, Circle-14(1), Kolkata.
Appellant		Respondent

&

I.T.A. No. 2058/Kol/2017
Assessment Year: 2013-14

M/s. Lexmark International (India) Pvt. Ltd. (PAN: AAACL6752B)	Vs.	Deputy Commissioner of Income-tax, Circle-14(1), Kolkata.
Appellant		Respondent

Date of Hearing	12.07.2018
Date of Pronouncement	28.09.2018
For the Appellant	S/Shri S. P. Singh & Manoneet Dalal & G.P. Srivastava, Ld. ARs.
For the Respondent	Shri Sanjay Paul, Addl. CIT, Sr. DR

ORDER

Per Shri Satbeer Singh Godara, JM

The assessee has filed the instant four appeals for AYs. 2008-09, 2011-12, 2012-13 and 2013-14 against the CIT(A)-10, Kolkata's order dated 06.10.2016 in first assessment year and against the DCIT, Circle-11, Kolkata's assessment orders dated 16.11.2015, 30.12.2016 and 18.07.2017 (in latter three assessment years) involving proceedings u/s. 143(3) read with section 144C of the Income-tax Act, 1961 (hereinafter referred to as the "Act").

2. We have heard both the parties. Case files perused. We proceed assessment year wise for the sake of convenience and brevity.

ITA No. 268/Kol/2017 – AY 2008-09

3. The assessee's sole substantive ground raised in the instant appeal challenges the lower authorities action making arms length price adjustment of Rs.2,50,45,534/- relating to its international transactions in the nature of provision of software services to its associate Eenterprises (AE). The assessee-company engaged in printers, accessories and software development services. It rendered provision for software development services of Rs.34,42,19,850/- to its overseas AE in the relevant previous year. The Transfer Pricing Officer (TPO), the Assessing Officer (AO) and the Ld. CIT(A) are unanimous in making the impugned ALP adjustment regarding the above provision made for software development service involving ALP adjustment of Rs.2,50,45,534/-. The assessee's only substantive argument during the course of hearing is that the CIT(A) has erred in law and on facts in denying working capital adjustment rebate which has to be mandatorily allowed as per various Tribunals' decisions in *Phillips India Ltd. Vs. DCIT*, ITA Nos. 863 & 539/Kol/2016, Acusis Software India Pvt. Ltd. Vs. ITO – TS-940-ITAT-2016 (Bangalore) and Global e-Business Operation Pvt. Ltd. Vs. DCIT – TS-654-ITAT-2017 (Banglaore). Learned Counsel has filed an elaborate chart of all the eight comparable entities indicating that such a working capital adjustment would bring an arithmetic wlan of the said entities to 9.32% as against the TPO's arm's length price determined in this case @ 12.25% in issue.

4. Learned CIT-DR vehemently supports the Ld. CIT(A)'s findings denying the assessee the impugned working capital adjustment relief as under:

"*9. Regarding the grounds and issues relating to the Working capital adjustment, I find that the Ld. TPO has recorded as under:*

> "As evident from the above sequence of events, the need for making working capital adjustments to the comparable companies by the assessee arose upon the realization that possible adjustments could be made in its case in respect of its international transactions on "provision of Software development Services". It must be mentioned that the assessee-company itself has provided the updated margin of the selected comparable companies of the assessee for the F. Y 2007-08, wherein the arithmetic mean as computed by the assessee came to 17.01%. Based on the search analysis and the data of the assessee, the TPO has proposed adjustment. During the course of the Transfer Pricing proceedings, the issue of making capital adjustment to the comparable companies was never brought up before the TPO until towards the close fo the proceedings wherein, the assessee suo mottu made such submission along with the details requisitioned by the TPO. In its letter dated 24.10.2011 reproduced below, the assessee stated that:
>
> > "The assessee has in its transfer pricing documentation discussed this aspect of working capital even though the capital adjusted operating margins were not calculated .....
> >
> > As the assessee does not employ Significant finds in working capital in comparison to comparable companies, to have a better comparability, the assessee proposes to adjust the return of the comparable companies from their return on working capital. This has been done in order to ensure that the comparison between the assessee and the comparables was on a like to basis ."

Without prejudice to the assessee's submission, on examination of the Transfer Pricing Documentation submitted by the assessee on 18.03.2011, it was found that the assessee has simply given the working definition of "capital Adjusted Operating Margin as it has done in the case of "Cost Cover Ratio". In addition, the assessee has neither brought on record any evidence / document, nor conducted any analysis / study to prove that it "does not employ Significant funds in working capital in comparison to comparable companies". Thus it would not be misplaced to arrive at the conclusion that the working capital adjustment proposed by the assessee is an afterthought, considered by the assessee in pursuance to the proposed adjustment made by the TPO based on the assessee's computed margins of its selected comparables for the F. Y 2007-08.

The assessee has also placed reliance on the judgment of the Hon'ble ITAT in the case of A M Todd Company Pvt. Vs Income Tax officer ITA No / Mum/ 2006. On examination of the said judgment, it is found that the decision of the Hon'ble ITAT relates to the allowance of fresh claim by the assessee during the assessment proceedings on an amount erroneously offered by it for taxation, which was otherwise liable for exemption. The facts and circumstances of the case are clearly different from that the assessee's and would not be applicable in the assessee's case. In view of the foregoing, the working capital adjustments made to the comparable companies by the assessee is rejected.
The arithmetic mean of the comparable companies submitted by the assessee on 27.09.2011 for the F. Y 2007-08 of 17.01%, however on examination of the financials of the comparable companies submitted by the assessee, it is seen that the assessee has considered comparable companies having turnover as high as above Rs.1,000 Cr (Prithvi Information Solutions Ltd J and low as below Rs.10 crores in the case of VJIL Consulting Ltd. In view of the same, the comparable companies having extremely high sales / turnover and exceedingly low turnover are thus, rejected to justify the scale of business of the assessee as well as to arrive at a more comparable scenario with that the assessee. Thus the arithmetic mean of the comparable companies after rejection of the above companies comes to 19.34."

10. Having examined the issue and the action of the Ld. AO I TPO, and the submissions made by the appellant, I find myself in agreement with the Ld. TPO, that the issue of working capital was introduced by the appellant as an afterthought, In any case, the appellant by its own admission employs a very meager working capital, and the same does not weight for consideration of

comparables. A regards the filter, I find that the Ld TRP has statistically tries to balance and make rational the exercise, by taking out the extremes of very high turnovers and very low turnovers when taking the comparables. The Ld A.R has given very general and non-specific reasons as to why there ought to be a need to make any adjustments pertaining to the working capital in its case. I am not inclined to see a need for such adjustments, and do not find the theory of "economy of scales' relied upon by the appellant as pertinent to its case. With that view of the matter, I find no requirement to interfere in the adjustments made by the Ld. TPO, and sustain the same.

The grounds taken by the appellant therefore stand dismissed."

5. We have given our thoughtful consideration to rival contentions. We find that the very issue of working capital adjustment arose in AY 2014-15 as well wherein the DRP's recent direction dated 21.03.2018 asked the AO to give a similar adjustment in the following terms:

"a) Compute the average of opening and closing balances of inventories, trade debtors/receivables, trade creditors/payables of both the tested party and the comparables, on revenue account only.

b) work out the net working capital ratio (in percentage) after dividing the net working capital by operating cost/sales or such denominator (as is used in the PLI) both for the tested party and the comparables.

c) determine the difference between the tested party's ratio with that of each comparables.

d) thereafter multiply the above difference by interest rate i.e. SBI Prime Lending Rate as on 30th June of the relevant financial year.

e) lastly, these adjustments are to be added to the profit margin of comparable companies a finally determined in accordance with the directions of this Panel.

f) Besides, credits received from various group concerns or loans etc. should not be taken into account."

6. Learned DRP has made it clear that the Assessing Officer would apply SBI's prime lending rate as on 30th June of the relevant previous year as the interest rate qua the issue before us. The Revenue fails to dispute all these intervening developments. Coupled with this, the above co-ordinate bench's decisions (supra) have also accepted similar working capital adjustment contentions against the Revenue. We therefore restore the instant lis back to the TPO for afresh proceedings *qua* the instant working capital adjustment to be considered / granted as per law .

7. Learned Counsel representing assessee at this stage raises an alternative plea of application of Rule 10B(2) of the I. T. Rules, 1962 that comparability in transfer pricing

proceeding needs to be seen as per functions, aspects and risks assumed (FAR analysis) and the turnover or profits/loss *ipso facto* does not lead to acceptance or rejection of the comparable entities. His case therefore is that the lower authorities ought to have included M/s. Prithvi as well as VJIL Consulting Ltd. in the final list of comparables. We are of the view that since the former plea of working capital adjustment already stands restored back to the TPO, no further adjudication is required to be made at this stage in the instant appeal. We accept ITA 268/Kol/2017 partly for statistical purposes.

8. We now come to the latter three assessment years cases raising the identical substantive ground(s) challenging validity of assessments on account of the Assessing Officer's failure in not issuing sec. 143(2) notice. We make it clear that assessee's latter substantive ground identical in all cases challenges correctness of the lower authorities' action making ALP adjustment in respect to its provision made for software development services to the tune of Rs.6,90,26,873/-, Rs.44,21,06,869/- and Rs.49,96,24,564/-; respectively on various factual and legal aspects. The assessee raises only the former legal plea during the course of hearing before us. It first of all takes us to various judicial precedents viz. *ACIT Vs. Hotel Blue Moon* (2010) 188 Taxman 13 (SC) that an Assessing Officer must necessarily issue section 143(2) notice within the time prescribed in proviso thereto and absence of such a compliance renders the entire assessment unsustainable. This tribunal's decision in *Krishnendu Chowdhury Vs. ITO* (2017) 78 taxmann.com 89 (Kol. Trib.) holds that section 143(2) notice has to be issued by the competent Assessing Officer having jurisdiction at the relevant point of time. Next is *Chanakya Finvest (P) Ltd. Vs. ITO* (2013) 34 taxmann.com 206 (Kol.Trib.) that where an assessment is transferred from one Assessing Officer to another, all pending proceedings have to be commenced after such a transfer simultaneously. Another decision in *ITO Vs. NVS Builders Pvt Ltd.* (2018) 91 taxmann.com 462 (Del.Trib.) that non-service of section 143(2) notice within the prescribed period renders the entire assessment a invalid. Last judicial precedent is Indorama Software Solution Ltd. Vs. ITO (2013) 29 taxmann.com 78 (Mum. Trib.) that section 148 notice issued by an Assessing Officer not having jurisdiction is patently illegal and all consequential proceedings in furtherance thereto are liable to be set aside.

We keep in mind the unanimous legal proposition propagated by the above judicial precedents that issuance of section 143(2) notice by the competent Assessing Officer having is a mandatory condition before framing of a scrutiny assessment and non-compliance thereof renders the entire consequential proceedings to be non-est in the eyes of law.

9. We now advert to the relevant facts of the case. There is no dispute that the regular assessment in all these three assessment years have been framed on 16.11.2015, 30.12.2016 and 18.07.2017 by the DCIT/ACIT, Cir-14(1), Kolkata in furtherance to CBDT's notification dated 22.10.2014 and the CIT(A)-4, Kolkata's order dated 15.11.2014. Relevant sec 143(2) notices dated 13.09.2012, 20.08.2013 and 04.09.2014 (assessment year wise) have been issued to the assessee by the DCIT/ACIT, Circle-II(4), Chennai. We afforded ample opportunity to the CIT-DR to file necessary status report on record. Paper book pages 5A and 5B coming from Assessing Officer's end to this effect vide letter dated 09.04.2018 explain the relevant factual position as under:

> "*Submission of report in the case of M/s Lexmark International (India) Pvt. Ltd., PAN: AAACL6752B for the AY 2011-12 to 2013-14-reg.*
>
> *Ref: No.CIT(DR)/ITAT/C-Bench/2017-18, dt. 27.03.2018*
>
> *Please refer to the above*
>
> *As desired, point wise report given below.*
>
> *1. Whether any notice u/s 143(2) was issued by the jurisdictional AO Notice u/s 143(2) issued on 04.09.2014 by DCIT-II(4), Chennai, holding the PAN at that point of time. No such notice was issued by the DCIT, Circle-14(1), Kolkata*
>
> *2. No copy of notice u/s. 143(1) is there as no such notice was issued by DCIT, Circle-14(1), Kol as per available records.*
>
> *3. The present jurisdictional AO i.e. DCIT, Circle-14(1) continued with the notice u/s. 143(2) already issued by the DCIT-II(4), Chennai.*
>
> *The fact of the case is that an order u/s. 127(2) was passed by the CIT-9, Mumbai on 03.05.2010 transferring jurisdiction from DCIT, Circle-9(2), Mumbai to DCIT-11, Kol while mentioning of PAN lying with the ACIT Central Circle-II(4), Kol.*
>
> *Oni checking of the data base, it has been found that the assessee was having its address at Appejay Business Centre 12 Haddows Road, Chennai, Tamilnadu, Pin-600006 with another PAN AAACL7642N simultaneously with the present PAN AAACL6752B at DLF IT Park, Block-I 5th Floor, 08 Major Arterial Road, New Town, P.S. Rajarhaat, North 24 Parganas, Kolkata, W.B. Also*

CBN Pan based query in ITD reveals that PAN: AAACL7642A was having with OLD DCIT COY CIR-11(4) CN. Thereafter, the PAN was deleted in de-duplication process or 08.02.2008 and PAN AAACL6752B was retained. Further, jurisdiction history of PAN shows that the PAN AAACL6752B was transferred from OLD DCIT COY CIR-II(4) CN to CORPORAT WARD-4(4) CHE on 30.12.2014 and finally got transferred to DCIT. Circle-14(1). Kol from corporate wardd-4(4), CHE on 11.03.2015. Thus, the assessee was having two PANs with address of Chennai and as the PAN was lying with Cir II(4) CN at that point of time when notice u/s. 143(2) was issued Notice u/s. 143(2) had its limitation in terms of issuing within the stipulated period.

The notice generated through system and issued subsequently to the assessee by the AO holding jurisdiction over the assessee for lying of PAN jurisdiction.

Issue of notice and subsequent completion of assessment is not irregular or illegal. The PAN jurisdiction was transferred on 11.03.2015 and the present jurisdictional officer had no time to issue a notice u/s. 143(2) of the IT Act again as no notice under this sub-section shall be served on the assessee after the expiry of six months. Obviously, the AO issued subsequent notices u/s. 142(1) and preceded on completion of the assessment proceedings.

The matter got complicated due to assessee's having two PANs with address of Chennai, though the assessee never pointed to this fact while questioning the legality of the notice u/s 142(2).

Sec. 142(2) has stated that the Assessing Officer or the prescribed income tax authority as the case may be, shall serve on the assessee a notice. The provisions of the Act does not use the word jurisdiction as assessing officer and for holding of PAN the DCIT, Cir-II(4), CN was the jurisdictional assessing officer at that point of time, moreover, the assessment was done by the DCIT, Cir-14(1), Kol, finally.

The question on jurisdiction for issue of notice u/s. 143(2) does not affect the proceedings as it is amply clear that due to PAN jurisdiction the notice was generated and subsequently transferred. Notice u/s. 142(10 in spirit ensures establishing the jurisdiction over the assessee and the assessing officer had followed the subsequent steps of an assessing officer with due diligence to complete the assessment proceedings on issuance of notice u/s. 143(2).Sec 142(1) precedes the issuance of notice u/s. 143(2) and empowers the assessing officer for calling of return of income with inquiry before assessment. The assessee did not challenge the validity of notice u/s 142(1) ad stated the notice issued u/s. 143(2) as invalid. Moreover, while passing of over for the AY 2006-07, 2007-08, 2008-09 by CIT, Circle-11, Kol, the PAN jurisdiction remained to be with Chennai office. Thus the assessee agreed to the assessment of earlier years, thereby accepting DCIT, Circle-11, as the assessing officer, therefore, the assessee's move in this respect for the AY 2011-12, 2012-13, 2013-14 is not acceptable.

Issue of notice u/s 142(2) by the AO holding PAN jurisdiction does not vitiate the proceedings as the same is simply a formal timely requirement before ensuring that the assessee has not understated the income or has not computed excessive loss or has not underpaid the tad in any manner as per provisions of the Act.

On going through the submissions of facts and argument of the assessee it is found that the assessee has written on non-issue of notice by the DCIT, Cir-11, Kol and there is no force in the argument excepting highlight of the issuance of notice as invalid. Even relevant case law cited does not fit into the facts of the case. The assessee in its profile written of foundation in 1991 and the PAN allotment shown on 30.10.2001. Hence, the entire thing revolves on issues connected to the cases in totality of thee facts and no way bar the AO to complete the proceedings lawfully.

As requested, assessment records for the AYs 2012-13 & 2013-14 are forwarded to your office, however, it may please be noted the assessment record for AY 2011-12 has not yet been received by this office."

10. We have given our thoughtful consideration to rival contentions qua the instant legal issue. All the above narrated facts and circumstances make it sufficiently clear that the DCIT/ACIT, Circle-II(4), Chennai lacked jurisdiction to issue the sec.143(2) notices. The assessee duly brought on record its objections to this effect before the Assessing Officer in its letter dated 08.10.2014 (page 59 to 60 of the paper book). All this proved to be a futile exercise as the Assessing Officer framed assessment going by the earlier scrutiny notice(s) only and rejected the said jurisdictional plea. We accordingly conclude in view of the above stated judicial precedents and facts on record that all the three impugned assessments are non-est in the eyes of law since the DCIT/ACIT, Circle-11(4), Chennai issuing the section 143(2) notice(s) did not have jurisdiction and the assessing authority in Kolkata did not issue such scrutiny notices. We quash all these three assessments therefore for this precise reason alone. The assessee succeeds in identical legal ground challenging validity of assessments in these three assessment years. Its latter substantive issue on merits challenging correctness of "ALP" adjustment (supra) is rendered academic. The assessee's instant later three appeals being ITA Nos. 72/Kol/2016, 235 and 2058/Kol/2017 are accepted therefore.

11. Assessee's first appeal in ITA No. 268/Kol/2017 is partly accepted for statistical purposes in above terms whereas latter three appeals in ITA No. 72/Kol/2016 and ITA No.235 & 2058/Kol/2017 are allowed.

Order is pronounced in the open court on 28th September, 2018.

Sd/- Sd/-

(Dr. A. L. Saini) (Satbeer Singh Godara)
Accountant Member Judicial Member

Dated : 28th September, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Lexmark International (India) Pvt. Ltd., DLF IT Park, Block-1, 5th floor, 8, Major Arlterial Road, Kolkata-700 156..
2 Respondent – DCIT, Circle-11 & Circle-14(1), Kolkata
3. CIT(A)-10, Kolkata.)
4. CIT – , Kolkata
5. DR, ITAT, Kolkata.

/True Copy, By order,

Sr. Pvt. Secretary