

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "I-1": NEW DELHI  
(Through Video Conferencing)**

**BEFORE  
SHRI R.K. PANDA, ACCOUNTANT MEMBER  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

ITA No. 3541/Del/2016  
Asstt. Year 2010-11

M/s. Bain & Company India Private Ltd. 5 <sup>th</sup> Floor, Building No. 8 Tower A, DLF Cyber City, Phase-II, Gurgaon-122002 Haryana (Appellant)	Vs.	DCIT Circle I (1), Gurgaon, Haryana (Respondent)
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Assessee by:	Shri Tarandeep Singh, Adv.
Department by :	Ms. Maimun Alam, Sr. DR
Date of Hearing	14/09/2020
Date of pronouncement	29/09/2020

**ORDER**

**PER R.K. PANDA, AM**

This appeal filed by the assessee is directed against the order dated 31<sup>st</sup> March 2016 of the Ld. CIT(A)-1, Gurgaon relating to assessment year 2010-11.

2. The grounds raised by the assessee are as under :-

1. *“That on the facts and circumstances of the case and in law, the Learned Commissioner of Income -tax (Appeals) -1, Gurgaon [‘Ld. CIT(A)’], has grossly erred in upholding the order of the Deputy Commissioner of Income-tax Circle-I(I), Gurgaon (‘the Ld. AO’) in disallowing the provision for professional cost amounting to INR 94,97,000.*
2. *That on the facts and circumstances of the case, the Ld. CIT(A) has failed to appreciate that the above provision represents the liability incurred for the period and hence is an allowable deduction.*
3. *That the Ld. CIT(A) has erred in not adjudicating on the fact that the benefit has been conferred n the Appellant from the use of consulting technique and know-how including consulting toolkits and insights developed and maintained by Bain USA for which the royalty was paid by the Appellant.*
4. *The Ld. CIT(A) has erred in not adjudicating on the fact that the information and documents submitted by the Appellant amply demonstrate the benefit received by it from the use of intangible assets for which the royalty payment was made to Bain & Company Inc.*

*That the above grounds of appeal are independent and without prejudice to each other.*

*That the Appellant reserves its right to add, alter, amend or withdraw the ground of appeal either before or at the time of hearing of this appeal”*

3. Facts of the case, in brief, are that the assessee is a company and filed its return of income declaring loss of Rs. 14,31,96,996/-. During the course of assessment proceedings the AO noted that the assessee had made provision for professional cost amounting to Rs. 94,97,000, which has been debited to P&L account. Vide order sheet entry dated 20-2-2014 the assessee was asked to tell the basis of making the said provision and to establish that it is an ascertained liability. The

assessee, vide reply dated 28-2-2014, submitted that the said provision was made for the months of Jan-March 2011. No basis for making the said provision was furnished. He further noted that as per record, no invoice had been raised by Bain US as on 31-3-2011. The AO, therefore, noted that the assessee has failed to establish that provision for professional support cost was an ascertained liability and therefore, it has to be treated as a contingent liability. Referring to the decisions in the case of Sree Sajjan Mills Ltd v CIT[1985]56ITR585(SC) and Indian Molasses Co Ltd v CIT 371TR66(SC) he held that contingent liabilities are to be disallowed. He accordingly added back the amount of Rs. 94,97,000/- being provision for professional cost.

4. In appeal Ld. CIT(A) upheld the action of the AO by observing as under :-

*“7.2 I have given careful consideration to the arguments of the appellant and find that the allowability of any provision is dependent upon the fact that whether such liability has been fully ascertained and the appellant has been adopting consistent accounting principle on year to year basis. It is not open to the appellant to claim the expense on provision basis in one year and in the other year on actual basis.*

*In the present case it is indicated from the table below that uniform policy has not been followed:-*

	2008-09	2009-10	2010-11	2011-12	2012-13
Invoice amount	1,22,00,177	2,40,36,196	3,79,88,001	7,48,74,834	10,39,26,337
Provision made	130,50,000		94,97,000	1,87,18,709	2,59,81,584
Provision reversed in A.Y 2009-10	(30,50,000)				
Provision reversed in A.Y 2011-12			(94,97,000)		
Provision reversed in A.Y 2012-13				(1,87,18,709)	
Provision reversed in A.Y 2013-14					(2,59,81,584)

*It is seen that no consistent policy has been followed by the appellant because no provision was made in the A.Y 2009-10. The expenses were claimed on actual basis and this would have resulted in aberration of accounts. The Assessing Officer followed decision in the case of Sree Sajjan Mills Ltd. v CIT (1985) 56 ITR 585 (SC) and Indian Molasses Co Ltd. v CIT 37 ITR 66 (SC). I find no infirmity in the approach of the Assessing Officer after considering the contention of the appellant and hence the ground of appeal is dismissed.”*

5. Aggrieved with such order of the Ld. CIT(A) assessee is in appeal before the Tribunal.

5.1 The counsel for the assessee strongly challenged the order of the Ld. CIT(A) in confirming the addition made by the AO. He submitted that the assessee during the year under consideration has recognized the provision of Rs. 94,97,000/- in the books of accounts on account of professional support cost payable to its group companies. This provision made pertains to services availed from the group companies during the period January to March, 2010. He submitted that the provision was made on scientific and realistic estimate. Ld. Counsel for the assessee referring to the Support Service Agreement dated 1<sup>st</sup> April, 2010 with its AE i.e M/s. Bain & Company India Private Ltd. submitted that services availed under the agreement are detailed in Annexure A clause 1.1.

and compensation payable under rule thereof in prescribed Annexure B therein as per clause No. 2.1. He drew the attention of the Bench to the compensation clause which reads as under :-

“Compensation

*2.1 Bain India agrees that in case, it avails, Support Services from Company, it will continue to cost which would be computed based on all Company’s costs and expenses and time actually spent for the conduct of Support (including overhead properly allocate to such Support)*

*2.2 Any payment by either party shall include the applicable service tax, if any.*

*3. Parties also agree that detailed documentation of Support Services provided will be maintained and will be invoiced annually as seen after the close of the financial year as administratively feasible, but no later than sixty (60) a days after the year end.*

*4. Payment shall be made within thirty (30) days of issuance of the invoice for the Support provided. Amounts can be settled vis a so-called intercompany Account.”*

6. He submitted that the service stipulated in Annexure A of agreement has been rendered by the AE and the assessee has derived benefit therefrom during the year under consideration. He submitted that the TPO has not doubted the benefit test vis-a-vis these services which can be verified from the order of the TPO. He submitted that the assessee receives invoice from its overseas group companies for professional services at the end of the calendar year i.e in the month of December of every year. On

account of the same the assessee recognised a provision for expenses for the month of January to March on an estimate basis. He submitted that the provision recorded in books of accounts is calculated on a prorata basis based on the invoice received for the services rendered by overseas group companies till the month of December as invoicing is done in calendar year. Accordingly for the year under consideration a provision of Rs. 94,97,000/- was recognised and the same was based on the invoice received for 2009.

7. He submitted that during the subsequent years the assessee has followed the same basis of recognizing the provision for the period January to March. He submitted that the provision made during the year under consideration are reversed in the financial year and expenses on actual basis are recognized by the assessee based on the invoice received from the companies . He submitted that this policy is being consistently followed by the assessee in the subsequent years. He submitted that inadvertently owing to clerical error no provision was made in financial year 2008-09 relevant to assessment year 2009-10. Ld. CIT(A) made this as a basis to allege that no uniform policy is being adopted. He submitted that the present case pertains to assessment year

2010-11 i.e. Financial year 2009-10. Since owing to inadvertence no provision was made and claimed in assessment year 2009-10 the same cannot be made the basis for adjudication in assessment year 2010-11.

8. Referring to the decision of Hon'ble Delhi High Court in the case of Mrs. V Chandra reported in 245 ITR 610 he submitted that there is no estoppel against statute. Further the provision made for assessment year 2010-11 has been reversed in assessment year 2011-12 and therefore any disallowance made will result in double taxation. He submitted that the assessee prepares its financial statements in accordance with the generally accepted accounting principles in India on accrual basis. Further based on the review of the financial statements it can be seen that even the statutory auditors have not mentioned this provision as a contingent liability. Referring the decision of the Hon'ble Supreme Court in the case of Rotork Controls India (P) Ltd. reported in 314 ITR 62 (SC) he submitted that the provision made cannot be classified as a contingent liability. He accordingly submitted that the order of the Ld. CIT(A) be set aside and the grounds raised by the assessee be allowed.

7. Ld. DR on the other hand heavily relied on the order of the Ld. CIT(A) . He submitted the assessee is not following uniform policy for making / claiming the provision . Therefore the Ld. CIT(A) was fully justified in rejecting the claim of the assessee and thereby upholding the addition / disallowance made by the AO.

8. We have heard the rival arguments made by both the sides, perused the order of the AO and Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO in the instant case disallowed the provision of professional cost amounting to Rs. 94,97,000/- debited to the profit and loss account on the ground that the assessee could not substantiate the basis for making the said provision. There was no invoice raised by Bain US as on 31.3.2011 and thus the assessee failed to establish that provision for professional support cost was an ascertained liability. We find the Ld. CIT(A) upheld the action of the AO, the reasons of which have already been reproduced in the preceding paragraphs. It is the submission of the Ld. Counsel for the assessee that as per the agreement the AE has rendered services to the assessee and assessee has derived benefit from there and TPO has not doubted the benefit test vis-a-vis these services.



Further the assessee in subsequent years has followed the same basis of recognizing the provision for the period January to March. Only during the impugned assessment year due to some clerical error assessee inadvertently could not make any provision and there is no estoppel against statute. It is also his submission that the various case laws relied on by the Ld. CIT(A) are distinguishable and are not applicable to the facts of the present case.

9. We do not find any force in the above arguments of the Ld. Counsel for the assessee. A perusal of the audited account of the company shows that the assessee had a huge loss in the immediately preceding assessment year and probably for this reason the assessee had not made any provision for professional cost. However during the current year such loss has substantially reduced and in the subsequent years assessee has started showing income. Further we do not find any merit in the arguments of the Ld. Counsel for the assessee that inadvertently owing to clerical error no provision was made in financial year 2008-09 relevant to assessment year 2009-10. It is pertinent to mention here that the accounts of the company are audited by reputed CA firm and therefore it cannot be said that it is an

inadvertent error. Even if the same is considered as an inadvertent error, the assessee has not taken any step to revise the return of income. Therefore, we fully concur with the findings of the Ld. CIT(A) that assessee has not adopted consistent accounting principle on year to year basis and it is not open to the assessee to claim the expense on provision basis in one year and on accrual basis in the other year.

10. The decision of the Hon'ble Apex Court in the case of Rotork Controls India (P) Ltd. relied upon by the Ld. Counsel for the assessee is not applicable to the facts of the present case. In that case the question was as to whether for a provision to qualify for recognition, there must be a present obligation arising from past events, settlement of which is expected to result in an outflow of resources and in respect of which a reliable estimate of amount of obligation is possible. It was held that if historical trend indicates that in past large number of sophisticated goods were being manufactured and defects existed in some of items manufactured and sold, then provision made for warranty in respect of army of such sophisticated goods would be entitled to deduction from gross receipts under section 37(1) provided data is systematically maintained by assessee. However in the present case, as

mentioned earlier, the assessee is not adopting consistent accounting principle on year to year basis. Therefore we do not find any infirmity in the order of the Ld. CIT(A) confirming the disallowance made by the AO at Rs. 94,97,000/-. Accordingly the order of the Ld. CIT(A) is upheld and grounds raised by the assessee are dismissed.

10. In the result the appeal filed by the assessee is dismissed.

**Order pronounced on 29<sup>th</sup> September, 2020.**

sd/-

sd/-

**(SUDHANSHU SRIVASTAVA)**  
**JUDICIAL MEMBER**

**(R.K. PANDA)**  
**ACCOUNTANT MEMBER**

Dated: 29/09/2020

**Veena**

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi