IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : C : NEW DELHI

BEFORE SHRI I.P. BANSAL, JUDICIAL MEMBER
AND
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER

ITA No.5504/Del/2010
Assessment Year : 2006-07

M/s iPolicy Network Pvt. Ltd., (subsequently merged with Tech Mahindra Ltd.), SDF B#1, Noida Special Economic Zone, Noida – 201301 (UP).	Vs.	Income Tax Officer, Secretariat, Dispute Resolution Panel II New Delhi.

PAN : AAAC1902Q

(Appellant) (Respondent)

Assessee by : Shri Ajay Vohra, Adv., Sh. Neeraj K. Jain, Adv., Sh. Abhishek Agarwal, Adv. & Shri Pallav Raghuvanshi, Adv.
Revenue by : Shri Narender K. Chand, Sr. DR

ORDER

PER I.P. BANSAL, JUDICIAL MEMBER

This is an appeal filed by the assessee under the provisions of Section 253 (1) (d) of the IT Act, 1961, against the order passed by the Assessing Officer dated 13th October, 2010 u/s 143 (3) read with Section 144C of the Income-tax Act, 1961 (the Act).

2. The main ground raised is that the Assessing Officer has erred on facts and in law in proposing to complete the assessment under section 144C/143(3) of the IT Act at an income of ₹ 75,09,415/-.

3. The assessee company is 99.96% subsidiary company of iPolicy Networks Inc., USA (iPolicy Inc.) and is an offshore development center

developing and exporting the application software to be integrated in the security products marked by iPolicy Inc. It entered into international transaction with its associate enterprises for an aggregate sum of ₹14,33,33,713/-. Reference was made to Transfer Pricing Officer to determine the arm's length price of such transaction u/s 92CA(1) of the Act. The TPO vide its order dated 8th October, 2009 has computed the arm's length price OP/TC at ₹ 15,08,43,128/- and a difference of ₹ 75,09,415/- is arrived at which has been added to the income of the assessee on account of transfer pricing adjustment. The assessee for determining the arm's length price has adopted TNMM method. According to search and screening process based on a review of business description 101 companies were selected as reasonable functional comparables and average of OP/TC on comparable companies, mean margin was arrived at (-) 0.33%. OP/TC of the assessee company was 10.06% and, accordingly, in the TP study, the assessee disclosed the international transaction being at arm's length price.

4. The TPO in its order had applied various additional filters and has rejected all the comparables except three parties mentioned below and has arrived at OP/TC percentage of 15.64%:-

Sl.No.	Name of the company	OP/TC%
1	SoftPro Systems	18.03
2.	Fortune Informatics Limited	8.05
3.	Sankhya Infotech	20.84
	Average	15.64

5 Accordingly, addition was made of ₹75,09,415/- being the difference in the revenue shown by the assessee and the arm's length price determined by the TPO.

6. The assessee, apart from challenging the determination of arm's length price on the basis of rejection of various comparables by contending that those companies have wrongly been rejected by the TPO, also has assailed the addition on the ground that upon application of proviso, as it stood before amendment, the addition was not called for as the added amount falls within the safe harbour of +/- 5%. A calculation in this regard has been furnished by the assessee vide following table to show that the addition was not called for as the difference did not exceed 5%:-

Particulars	As per the assessee	As per the TPO
Total cost of the assessee	130,442,000	130,442,000
Arm's length price @ margin of 15.64% (A)	150,843,128	150,843,128
5% of the ALP as determined (B)	7,542,156	
ALP of the international transactions as per the proviso to Section 92C(2) [(A)-(B)]	143,300,972	
Revenue Shown	143,333,713	143,333,713
Difference	(32741)	7,509,415

7. Referring to these facts, upon short issue, it was the case of Ld. AR that even if one does not go into other aspects of this appeal i.e., challenging the arm's length price determined by the TPO regarding the rejection of various other comparables, etc., the appeal should be decided in favour of assessee as the difference in the arm's length price determined by the TPO and the revenue received by the assessee does not exceed the safe harbour of -/+ 5% as per proviso to sub-section (2) of Section 92C of the Act.

8. It was submitted by Ld. AR that the benefit of proviso is available to the assessee according to the following decisions:-

i) Development Consultants (P) Ltd. vs. DCIT 115 TTJ 577 (Cal)

ii) Philips Software Centre (P) Ltd. vs. ACIT (2008) 26 SOT 226 (Bang.)
iii) DCIT vs. Sony India Pvt. Ltd., 114 ITD 448 (Del)
iv) Skoda Auto India Pvt. Ltd. vs. ACIT 122 TTJ 699 (Pune)
v) Electrobug Technologies Ltd. vs. ACIT 37 SOT 270 (Delhi)
vi) SAP Labs India Pvt. Ltd. vs. ACIT 398 & 418/Bang/2008 (Bang)
vii) Adobe Systems India (P) Ltd. vs. ACIT [ITA No.5043/Del/2010 (Del) – A Y 2006-07]

9. He further submitted that recently Delhi ITAT in the case of Haworth (India) Pvt. Ltd. in ITA No.5341/Del/2010 vide its order dated 29th April, 2011 has held that the benefit of safe harbour of +/- 5% is available to the assessee in a case where the arm's length price has been worked out by the TPO on the basis of more than one comparables. He, therefore, contended that on the short ground, the aforementioned addition should be deleted.

10. On the other hand, the first and foremost contention raised by Ld. DR was that the safe harbour of +/- 5% should be computed on the revenue shown to have been received by the assessee in respect of international transaction. He contended that if it is so done, then, the assessee's case will not fall under that safe harbour. Therefore, he contended that the benefit as claimed by the assessee is not available to it. He submitted that post amendment the proviso to sub-section (2) of Section 92C as inserted by the Finance (No.2) Act of 2009 read as under:-

> "Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices."
>
> Provided further that if the variation between the arm's length price so determined and price at which the international transaction has actually been undertaken does not exceed five per cent of the latter, the price at which the international

> transaction has actually been undertaken shall be deemed to be the arm's length price."

11. He submitted that so as it relates to applicability of the aforementioned amended proviso, the applicability of the provision has been explained in CBDT Circular No.F.142/13/2010-SO (TPL) dated 30.9.2010 (Corrigendum) as follows:-

> "This amendment will take effect from 1st October, 2009 and shall accordingly apply in relation to all cases in which proceedings are pending before the Transfer Pricing Officer (TPO) on or after such date."

12. He, therefore, contended that the amended proviso should be construed retrospectively and, in this regard, Ld. DR relied upon the following decisions:-

(i) K. Govindan & Sons vs. CIT 247 ITR 192 (SC)

(ii) Allied Motors (P) Ltd. vs. CIT (1997) 224 ITR 677 (SC)

(iii) CIT vs. Soft Beverages P. Ltd. 272 ITR 270 (Mad).

13. Thus, it was pleaded by Ld. DR that the amendment being clarificatory in nature should be construed retrospectively. He also referred to the earlier decision of the Tribunal in the case of DCIT vs. Global Vantedge Pvt. Ltd. (2010-TIOL-24-ITAT-Del) to contend that wherever difference exceeds 5%, the benefit of the proviso cannot be given to the assessee.

14. In the rejoinder ld. AR submitted that 5% safe harbour has to be computed on the arithmetical mean adopted by the TPO for computing arm's length price, hence, Ld. DR is wrong in contending that assessee's case does not fall within the safe harbour of +/- 5%. It was further submitted by Ld. AR that the proviso is a substantive provision imposing liability on the assessee, hence, it can not be construed retrospectively and, for this purpose, Ld. AR has placed reliance upon the Special Bench decision of Delhi ITAT in the case of ITO vs. Ekta

Promoters Pvt. Ltd. 113 ITD 719 and specifically to para 56 to 58 thereof. He also relied upon the Special Bench decision in the case of Kuber Tobacco Products Pvt. Ltd. vs. DCIT 117 ITD 273 (Del) (SB).

15. We have carefully considered the rival submissions in the light of the material placed before us. To resolve the controversy raised by both the parties in the present appeal, it will be necessary to first examine the pre and post amendment change in the proviso to sub-section (2) of Section 92-C. For that purpose, it will be necessary to reproduce the proviso pre-amended and post amended. The pre-amended proviso read as under:-

> "The most appropriate method referred in sub section (1) shall be applied for the determination of arm's length price in the manner as may be prescribed.
>
> Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices or at the option of the assessee, a price which may vary from the arithmetical mean by an amount not exceeding 5% of such arithmetical mean."

16. The post amended proviso which has been inserted by the Finance (No.2) Act, 2009 read as under:-

> "Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices."
>
> Provided further that if the variation between the arm's length price so determined and price at which the international transaction has actually been undertaken does not exceed five per cent of the latter, the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length price."

17. Before going into the details, it will be relevant to mention that the Finance Act, 2001 had substituted the existing Section 92 of the Income-tax At by new Sections 92 and 92A to 92F. Thus, new provisions laid down the norms to assess the income arising from an

international transaction between associate enterprises having regard to the arm's length price. Vide Circular No.12 dated 23rd August, 2001, keeping in view the new type of legislation, in the initial years and its implementation certain concessions were granted which read as follows:-

> "However, this is a new legislation. In the initial years of its implementation, there may be room for different interpretations leading to uncertainties with regard to determination of arm's length price of an international transaction. While it would be necessary to protect our tax base, there is a need to ensure that the taxpayers are not put to avoidable hardship in the implementation of these regulations.
>
> In this background the Board have decided the following:
>
> (i) The Assessing Officer shall not make any adjustment to the arm's length price determined by the taxpayer, if such price is up to 5 per cent less or up to 5 per cent more than the price determined by the Assessing Officer. In such eases the price declared by the taxpayer may be accepted.
>
> (ii) The provisions of sections 92 and 92A to 92F come into force with effect from 1st April, 2002, and are accordingly applicable to the assessment year 2002-05 and subsequent years. The law requires the associated enterprises to maintain such documents and information relating to international transactions as may be prescribed. However, the necessary rules could be framed by the Board only after the Finance Bill received the assent of the President and have just been notified. Therefore, where an assessee has failed to maintain the prescribed information or documents in respect of transactions entered into during the period 1-4-2001 to 31-8-2001 the provisions of section 92C(3) should not be invoked for such failure. Penalty proceedings under section 271AA or 271G should also not be initiated for such defaults.
>
> (iii) It should be made clear to the concerned Assessing Officers that where an international transaction has been put to a scrutiny, the Assessing Officer can have recourse to sub-section (3) of section 92C only under the circumstances enumerated in clauses (a) to (d) of that sub-section and in the event of material information or documents in his possession on the basis of which an opinion can be farmed that any such circumstance exists. In all other cases, the value of the international transaction should be accepted without further scrutiny."

18. Later on, the relaxation with regard to safe harbour of +/- 5% was brought into the statute by the Finance Act, 2002 w.e.f. 1.4.2002 which has been reproduced above and which is a proviso pre-amendment.

19. The post amendment proviso has substituted the earlier proviso w.e.f.1.10.2009. The explanatory notes to provisions of the Finance (No.2) Act, 2009 vide Circular No.5/2010 dated 3rd June, 2010 as per para 37.5 describe the applicability of the amendment in the proviso as under:-

> "37.5 Applicability – The above amendment has been made applicable with effect from 1st April, 2009 and will accordingly apply in respect of assessment year 2009-10 and subsequent years."

20. However, according to the corrigendum dated 30th September, 2010 issued by the Government of India, M/o Finance, Deptt. of Revenue, Central Board of Direct Taxes [F.No.142/13/2010-SO (TPL)], it was described as under:-

> "F.No.142/13/2010-S0 (TPL)
> Government of India
> Ministry of Finance
> Department of Revenue
> Central Board of Direct Taxes
>
> New Delhi, the 30th September, 2010
>
> CORRIGENDUM
>
> No. (F.No.142/13/2010-S0(TPL). In partial modification of Circular No.5 / 2010 dated 03.06.2010,
>
> (i) in para 37.5 of the said Circular, for the lines
>
> "the above amendment has been made applicable with effect from 1 st April, 2009 and will accordingly apply in respect of assessment year 2009-10 and subsequent years."
>
> the following lines shall be read;

> "the above amendment has been made applicable with effect from 1 st October 2009 and shall accordingly apply in relation to all cases in which proceedings are pending before the Transfer Pricing Officer (TPO) on or after such date."
>
> (ii) in para 38.3, for the date "1 st October, 2009", the following date shall be read: "1 st April, 2009."

21. On the basis of the aforementioned development and corrigendum, it is the case of Ld. DR that the date of order passed by the TPO is 8th October, 2009 and the amended proviso had come into existence on 19th day of August, 2009 when Finance (No.2) Act, 2009 had received the assent of the President, therefore, according to the corrigendum the amended proviso will be applicable in relation to the cases in which the proceedings were pending before the Transfer Pricing Officer (TPO) on or after such date. Thus, it was submitted by Ld. DR that only amended proviso is applicable in the case of the assessee and the assessee's case should be decided in view of post amended proviso. This argument has been taken by Ld. DR for the reason that if the amended proviso is taken into consideration, then, safe harbour of +/- 5% will be reckoned from the price received/paid by an assessee to/from its associate enterprise whereas if the case of the assessee will fall under the pre-amended proviso, then, safe harbour will be reckoned from the arm's length price determined by the TPO in a case where more than one price is determined by him by the most appropriate method. The case of the assessee fall within the marginal limit and, therefore, it is important to resolve this controversy first.

22. The statute (Finance (No.2) Act, 2009) while bringing substituted proviso stated its applicability w.e.f. 1st October, 2009 whereas when explanatory notes to the provisions of the Finance (No.2) Act, 2009 was issued vide Circular No.5/2010 dated 3rd June, 2010 it was incorrectly stated that the above amendment has been made

applicable w.e.f. 1st April, 2009 whereas the statute describe that it has been brought w.e.f. 1st October,2009, secondly, it explained that accordingly the amended proviso will be applicable in respect of 2009-10 and subsequent years, but, later on the Board has changed its stand and it describe that it shall apply in relation to all cases in which proceedings are pending before the TPO on or after such date. Therefore, till corrigendum is issued on 30th September, 2010, the position explained by the Board with regard to the amended proviso was that it shall be applicable in respect of assessment years 2009-10 and subsequent years and it was not the explanation of the CBDT that it shall apply to all cases in which proceedings are pending before the TPO on or after such date. The corrigendum dated 30th September, 2010 has only brought such position.

23. It is difficult to accept the argument of Ld. DR that retrospective or prospective applicability of a provision should be decided in a way which has been explained by CBDT. The retrospective applicability of a provision is to be seen purely in the light of the statutory provisions and the parameters laid down by the principles of interpretation. It cannot be decided simply on the basis of the view taken by CBDT ignoring the plain statutory language. The view expressed by the CBDT in the explanatory notes may in some circumstances work as a guidance, but they are not final words. The statute itself provide that amended proviso will be applicable w.e.f. 1.10.2009 and this position has not been changed and has been accepted in the corrigendum itself that this amendment has been made applicable w.e.f. 1st October, 2009 in place of 1st April, 2009 mentioned in the earlier Circular. Now, it is a question that whether by way of corrigendum can it be said that the amended proviso will be applicable in relation to all cases in which the proceedings are pending before TPO on or after such date. This corrigendum has been issued on 30th September, 2010. If it has to be

decided only by the CBDT, then, it can be said that on the date when TPO passed his order, this corrigendum did not exist. Therefore, we find no force in the argument of Ld. DR that the case of the assessee should be considered in the light of the post amended proviso, because of the reason that in the aforementioned corrigendum, it has been stated so.

24. Otherwise also as per well settled law, the first and foremost rule of construction of interpretation is that in the absence of anything in the enactment to show that it is to have retrospective operation and when amendment relates to a procedural provision resulting into creating a new disability or application and which imposes new duty in respect of transactions already completed, then, the said procedural provision also cannot be applied retrospectively. Similar is the position where the statute not only changes the procedure, but also crates new rights and liabilities, the same shall be construed to be prospective in operation unless otherwise provided for either expressly or by necessary implication. This has so been held by the Special Bench in the case of Kuber Tobacco Products (P) Ltd. (supra).

25. In the case of ITO vs. Ekta Promotors Pvt. Ltd. (supra), it is held that in the fiscal legislation, if a provision is brought for imposing any liability, the normal presumption will be that it has no retrospective operation and it is a cardinal principle of tax law that law to be applied is the law which is in force in the assessment year unless otherwise provided expressly or by necessary implication.

26. If the unamended proviso is compared with the amended proviso, then, it is clearly noticed that there is a substantial change in the relief given to the assessee. By the unamended proviso, an option was given to the assessee to have its price of international transaction in variation of (+/-) 5% of arithmetical mean through which the arm's

length price is determined by the TPO by adopting most appropriate method in a case where more than one price is determined by the said appropriate method. By the amended proviso, firstly it has been provided that in a case where more than one price is determined by the most appropriate method, the arm's length price will be the price as determined by adopting arithmetical mean of such prices. It is further provided that if the variation between arm's length price so determined and price at which international transaction has actually been undertaken and it does not exceed 5% of the latter, then, the price at which the international transaction has actually been undertaken shall be deemed to be the arm's length price. Thus, a deeming provision has been created to adopt an arm's length price if the price actually undertaken by the assessee does not exceed 5% of the amount at which international transaction has actually been undertaken. Thus, 5% difference has to be reckoned from the price at which international transaction has actually been undertaken instead of reckoning from price which is determined by the TPO, which was the position under unamended proviso. Thus, there is a basic difference in both the provisos i.e., pre-amended and post amended.

27. A bare reading of the pre amended proviso will clearly reveal that in a case where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices, or at the option of the assessee, a price which may vary from the arithmetical mean for an amount not exceeding 5% of such arithmetical mean. The arithmetical mean in the present case is 15.64% and by adopting the same, the arm's length price has been determined at ₹ 15,08,43,128/-. The arithmetical mean in the present case has been computed on the basis of three comparables, therefore, it is a case where more than one price is determined by the most appropriate method which is TNMM. If it is

so, then, 5% of a price which is determined by calculating the arithmetical mean is to be taken as the relevant difference for computing the benefit of safe harbour of +/- 5%. In other words, the safe harbour has to be computed with reference to arm's length price determined by the TPO. The 5% difference of arm's length price determined by the TPO comes to ₹75,42,156/- and if the same is included in the revenue shown to be received by the assessee, the total will come to ₹ 15,08,75,869/-, which is in excess of arm's length price determined by the TPO. Therefore, the difference in the arm's length price determined by the TPO and charged by the assessee is less than 5%. Therefore, applying the unamended proviso the addition on that very ground has to be deleted and is accordingly deleted.

28. As we have deleted the addition by giving the benefit of the proviso, we do not consider it just and proper to go into the other aspects on which also the assessee has assailed the addition as adjudication of other issues will be of academic in nature.

29. In the result, the appeal filed by the assessee is allowed in the manner aforesaid.

The order pronounced in the open court on 17.06.2011.

Sd/-	Sd/-
[SHAMIM YAHYA]	[I.P. BANSAL]
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated, 17.06.2011.

dk

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Deputy Registrar,
ITAT, Delhi Benches

Date of Dictation	30.05.2011
Date of Presentation of the draft order to the Member	31.05.2011
Date of return from the Bench after pronouncement &signing	17.06.2011
Date of dispatch of the order to the Bench	17.06.2011