

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'के', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "K", MUMBAI

सर्वश्री आर.एस. स्याल, लेखा सदस्य एवं विजय पाल राव, न्यायिक सदस्य, के समक्ष ।

Before Shri R.S.Syal, AM and Shri Vijay Pal Rao, JM

ITA No.7982/Mum/2011 : Asst.Year 2007-2008

M/s.Hamon Shriram Cottrell Pvt.Ltd. Main Frame, 3A-8A Ground Floor Royal Palms Complex, Goregaon (East) Mumbai – 400 065. PAN : AAAC2254Q.	बनाम/ Vs.	The Income Tax Officer Ward 8(2) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से /Appellant by : Shri S.N.Inamdar

प्रत्यर्थी की ओर से /Respondent by : Shri Ajeet Kumar Jain

सुनवाई की तारीख / Date of Hearing : 16.04.2013	घोषणा की तारीख / Date of Pronouncement : 19.04.2013
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आदेश / O R D E R

Per R.S.Syal (AM) :

This appeal by the assessee is directed against the order dated 26.09.2011 passed by the Assessing Officer u/s 143(3) read with section 144C(13) of the Income-tax Act, 1961 (hereinafter called the Act) in relation to the assessment year 2007-2008.

2. Briefly stated the facts of the case are that the assessee is a part of Hamon D'Hondt Group, which is headquartered in Belgium with its original and core business of design, manufacture, supply, erection and servicing of Cooling Systems, Heat Exchangers and Air Pollution Control systems. The assessee-company is engaged in the business of manufacturing, designing, engineering and supply of cooling towers, spares and providing engineering services. The assessee filed its

return declaring total income of ₹11,42,254. The assessee entered into six types of international transactions with its Associated Enterprises (AEs). Because of such international transactions, the Assessing Officer made reference u/s 92CA(1) to the Transfer Pricing Officer (TPO) for determination of Arm's Length Price (ALP). First transaction which is disputed in the present appeal is the payment of Management Fees amounting to ₹40,65,733 to its AE. The ALP of this transaction was determined by applying Comparable Uncontrolled Price (CUP) method. The assessee claimed to have paid the said amount at the rate of 1.5% of the turnover. The TPO observed that the total turnover of the assessee was at ₹16.21 crore. Even if the rate of 1.5% was accepted at ALP, still a Transfer Pricing (TP) adjustment of ₹16,34,091 was called for as 1.5% rate on the turnover would work out Management fees at ₹24.31 lakh as against the amount paid at ₹40,65,733. The second item which is disputed is Tender cost reimbursed. The assessee paid ₹28,61,598 . The TPO observed that this amount was paid on behalf of AE (Belgium) and the same was not paid back to the assessee. As such the ALP of this payment was treated as Nil thereby proposing an adjustment of equal amount at ₹28.61 lakh. The third item is R&D expenses paid by the assessee to the tune of ₹47,72,982. The assessee determined ALP of this transaction by applying the CUP method. It was observed by the TPO that a sum of ₹18.74 lakh out of this amount was a mere provision and further a sum of ₹13.91 lakh pertained to the year 2005. An adjustment of ₹18.74 lakh was recommended in respect of the amount of provision. That is how a total adjustment of ₹63,69,689

was proposed in respect of the above referred three items. There is no controversy in respect of the remaining international transactions. The amount as proposed by the TPO was added by the A.O. in the draft order passed u/s 143(3) read with section 144C(1) on 15.11.2010. The assessee agitated the TP adjustments made through the draft order before the Dispute Resolution Panel (DRP). The DRP noticed that the payments by the assessee to its parent AE in respect of Management fees, Tender cost reimbursed and R&D expenses were in the nature of intra group transactions. It was opined that no payment in respect of intra group services could be justified unless it was shown that some tangible and direct benefit was derived as a result of such payment or that the payment made was commensurate with the benefit derived or expected to be derived. As such a letter dated 27.07.2011 was sent by the DRP to the assessee seeking written explanation, documentation and evidence as to whether any specified services were rendered; and if rendered, whether two independent parties would be willing to pay for such services; and if two independent parties would be willing to pay, what would be the basis and amount of such payment. The assessee was further directed to furnish details in respect of Management fees which the TPO had considered at 1.5% of the turnover as at the ALP. Since the TPO, in the opinion of the DRP, did not examine as to whether any R&D services were rendered by the foreign AE for which a sum of ₹28.98 lakh was allowed, the DRP requested the assessee to furnish necessary details in this regard also. Similar direction was given *qua* the “Tender cost”. The assessee filed a reply on 16.08.2011 which the

DRP considered to be a simple reiteration of what was submitted before the TPO. In the absence of any additional information given by the assessee justifying these payments, the DRP held that no tangible and direct benefit was derived by such payment made by the assessee to its AE. As such, the DRP proposed an adjustment of ₹1,17,00,313 to the total income as against lower amount proposed by the TPO. The A.O. vide the impugned order passed u/ss 143(3) read with 144C(13) on 26.09.2011 made an addition of ₹1.17 crore as suggested by the DRP. The assessee is in appeal.

3. We have heard the rival submissions and perused the relevant material on record. The first question which looms large before us is as to whether the DRP is empowered to modify the TPO's order to the prejudice of the assessee when the objections have been taken against the draft order in terms of section 144C(2) of the Act. The stand of the assessee is that when it approaches the DRP for seeking some relief against the proposed TP adjustments, the authority can only grant some relief, if permissible, but has no power to make enhancement.

4. In order to find answer to this question, we need to refer to the provisions of section 144C, which deal with the reference to the DRP. Sub-section (1) of this section provides that the Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft order of assessment to the eligible assessee, if he proposes to make any variation in the income or loss

returned which is prejudicial to the interest of such assessee. The term "eligible assessee" has been defined in section 144C(15)(b) *inter alia*, to mean : `(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA'. In turn, section 92CA(3) provides that after taking into account all relevant materials which he has gathered, *'the Transfer Pricing Officer shall, by order in writing, determine the arm's length price in relation to the international transactionand send a copy of his order to the Assessing Officer and to the assessee.'* Sub-section (2) of section 144C provides that on receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order may, *inter alia*, file his objections, if any, to such variation with the Dispute Resolution Panel. A circumspection of the above provisions indicates that the assessee has been conferred with a right to object before the DRP to any variation in the income included in the draft order as a result of determination of ALP by the TPO in respect of international transactions. Once an assessee approaches the DRP objecting to the variations in the income as aforesaid, then it becomes obligatory on the part of the DRP under sub-section (5) of section 144C to issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment. What can be the ambit of the directions of the DRP has been more elaborately enshrined in sub-section (8), which provides that : *'The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not*

set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order’.

A close scrutiny of the mandate of this provision indicates that the DRP has been empowered not only to confirm or reduce the variation proposed in the draft order to the benefit of the assessee but also to enhance it to the prejudice of the assessee. This power of enhancement which was impliedly embedded in the matter of issuing directions, due to the use of expression ‘as it thinks fit’ in sub-section (5) has been expressly set out in sub-section (8) by categorically stating : ‘*..or enhance the variations’* in the draft order. Thus it is vivid that the power of the DRP in this regard is not restricted to only granting relief on the objections of the assessee against the variation in the income resulting due to the order of the TPO. It can also operate the other way around, if the DRP reaches the conclusion that the TPO erred in determining the ALP correctly, warranting further adjustment. In such a situation, the assessee, objecting to the variation in the income due to the order of the TPO, may land in difficulty, ending up with the enhancement of variation.

5. From the above discussion it follows that the DRP is fully empowered to “enhance the variations proposed in the draft order”. The natural corollary which follows is that so long as there is some variation proposed in the draft order, it is open to the DRP to enhance the amount of such variation, apart from confirming or reducing such variation. There can be no embargo on the power of the DRP, on a reference made by the assessee seeking relief against the proposed

adjustment, to enhance the transfer pricing adjustment made by the A.O. pursuant to the TPO's order.

6. Adverting to the facts of the instant case it is noticed that the TPO proposed adjustment in respect of Management fee, Tender cost reimbursed and R&D expenses totaling ₹63.69 lakh and the DRP enhanced this variation of ₹63.69 lakh to ₹1.17 crore. As the subject matter of enhancement in the present case continues to remain the same, being the adjustment flowing from the TPO's order, we find no force in the contention that the DRP ought not to have ventured to increase the variation to the prejudice of the assessee in a reference made by the assessee for reduction of the amount of adjustment made in the draft assessment order.

7. The Id. DR pressed into service *Explanation* to sub-section (8) of section 144C for bolstering his submission in support of the enhancement. At this juncture, it would be prudent to note the Finance Act, 2012 has inserted this *Explanation* with retrospective effect from 01.04.2009 which provides as under:-

“For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.”

8. A cursory look at the language of the *Explanation* divulges that the power of enhancement of the DRP has been further widened to all the matters arising out of the assessment proceedings relating to draft order irrespective of the fact whether they were raised or not by the assessee. With this amplification of the scope of the power of the DRP, now even the matters not agitated by the assessee before the DRP can also be considered for the purposes of enhancement. In other words, the hitherto limited scope of enhancing the variations proposed in the draft order has been expanded to encompass any matter arising out of the assessment proceedings relating to the draft order irrespective of the fact whether or not such a matter was raised by the assessee. However, it is pertinent to note that the insertion of the *Explanation* has been made with retrospective effect from 01.04.2009. Since we are dealing with the A.Y. 2007-08, the question as to whether such Explanation would also be applicable to the A.Y. 2008-09 or earlier years is left open to be decided on a suitable occasion.

9. Be that as it may the facts prevailing in the extant case are fully covered by the mandate of sub-section (8) of section 144C *de hors* the *Explanation* inserted retrospectively inasmuch as the enhancement has been directed by the DRP in respect of the variations proposed in the draft order. We, therefore, hold that the DRP was right in principle to embark upon the question of enhancement of the TP adjustments made by the A.O. in the draft order.

10. The learned Counsel for the assessee contended through ground no.1 that the DRP did not give reasonable opportunity of being heard to the assessee. Here it is relevant to note that the show cause notice dated 27th July, 2011 was issued by the DRP for enhancement of income fixing the date of hearing as 8th August, 2011. The said notice was received by the assessee on 1st August, 2011. The assessee appeared before the DRP on the scheduled date requesting for further time to compile the relevant details which were quite voluminous. Only one week's time was given. On 16th August, 2011 the assessee furnished some details and sought further time of 10 days for furnishing complete details. However, the DRP passed order on 18th August, 2011 itself directing the AO to make adjustment of ₹1.17 crore instead of ₹63.69 lakh as originally made in the draft order. The learned AR submitted that it was very difficult to compile the documents required by the DRP in such a short span of time. It was prayed that one more opportunity be granted to the assessee since the process of collection of all the necessary documents stood completed by the assessee as of now. No serious objection was taken by the learned Departmental Representative in this regard. In the facts and circumstances of the present case, we are of the considered opinion that it would be in the fitness of things if the impugned order is set aside and the matter is restored to the DRP for giving an effective opportunity to the assessee to present its case. We order accordingly and direct the DRP to issue directions u/s 144C(5) afresh as per law after allowing a reasonable opportunity of being heard to the assessee. Needless to say the assessee will be at liberty to file any

fresh evidence / documents in support of its case before the DRP in such *de novo* proceedings.

11. In view of our above decision of remitting the matter to the DRP, there is no need to adjudicate upon the grounds raised against the separate additions in respect of Management fees, Tender cost reimbursed and R&D expenses, on merits.

12. In the result, the appeal is allowed for statistical purposes.

Order pronounced on this 19th day of April, 2013.

आदेश की घोषणा दिनांक: को की गई ।

Sd/-

(Vijay Pal Rao)

न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-

(R.S.Syal)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 19th April, 2013.

Devdas*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / DRP-I, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai