

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C”BENCH: BANGALORE**

**BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

ITA No.654/Bang/2017
Assessment Year: 2010-11

3M India Limited Concorde Block, UB City 24, Vittal Mallya Road Bengaluru 560 001 PAN NO :AAACB5724H	Vs.	CIT (LTU) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Shri Sharath Rao, A.R.
Respondent by	:	Shri Pradeep Kumar, D.R.

Date of Hearing	:	11.08.2021
Date of Pronouncement	:	24.08.2021

O R D E R

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

The assessee has filed this appeal challenging the revision order dated 19.1.2017 passed by Ld. CIT(LTU), Bangalore for assessment year 2010-11 u/s 263 of the Income-tax Act,1961 [‘the Act’ for short]. The assessee is challenging the validity of same.

2. The assessee company is engaged in the business of manufacture and sale of pressure sensitive adhesive tapes, respirators, 3D graphics for automotive industry and corrosion protection products. The A.O. passed the assessment order for the

year under consideration u/s 143(3) r.w.s. 144C of the Act on 21.5.2014.

3. The Ld. CIT initiated revision proceedings u/s 263 of the Act, after examining the assessment record and coming to the conclusion that the assessment order passed is erroneous and prejudicial to the interest on the revenue on the following points:

1. *The scrutiny of the assessment record reveals that the income computation statement furnished by the assessee an amount of Rs.12,42,49,381/- being disallowance u/s 40(a) in earlier years was claimed in the AY 2010-11 on payment basis. The above amount includes Rs.2,80,00,000/- being Corporate Management Fees disallowed in AY 2009-10.*
2. *As per records of AY 2009-10 Corporate Management Fee was added back u/s 40(a)(i) in the income computation statement of the assessee. The same had been disallowed in assessment order dated 10.5.2013 r.w.s. 92CA dated 29.1.2013 as Transfer Pricing adjustment. While computing TP additions of that A.Y. an amount of Rs.2,80,00,000/- was not added to the TP adjustment considering the fact that the same was already disallowed u/s 40(a) as specified in TPO's order. Hence, the said amount should have been added back to income as TP adjustment and not u/s 40(a). As the above said amount had been disallowed as a TP adjustment and not u/s 40(a), the allowance of the same on payment basis in AY 2010-11 is not in order and resulted in short computation of income by Rs.2,80,00,000/- and there is a short levy of tax to the extent of Rs.1,42,75,800/-.*
3. *Foreign Service Employee expense which was an internal part of the supporting services should have been considered while computing ALP. This has resulted in short computation of TP adjustment by Rs.2,56,46,834/- and short levy of tax to the extent of Rs.1,30,76,547/-."*

4. The assessee objected to the revision proceedings by contending that there is no error in the order passed by the A.O. After considering the replies given by the assessee, the Ld. CIT passed the impugned revision order holding that the assessment order dated 21.5.2014 passed for the year under consideration is erroneous and prejudicial to the interest of the revenue.

Accordingly, he set aside the issues and remitted the matter to the file of the A.O. for considering them afresh. Aggrieved, the assessee has filed this appeal before us.

5. Point no.1 & 2 mentioned in paragraph 3 supra relate to single issue. The facts relating to the same are that the assessee had claimed expenditure of Corporate Management Services paid to its AE in the preceding year, i.e., AY 2009-10. The claim so made included 'year-end' provision made for an outstanding amount of Rs.2.80 crores. The assessee voluntarily disallowed above said amount u/s 40(a)(i) of the Act, since no tax was deducted at source from the provision for expenses so made. The TPO determined ALP of Corporate Management services at NIL. However, while computing the Transfer Pricing adjustment, he reduced the amount of Rs.2.80 crores voluntarily disallowed u/s 40(a). Accordingly, the transfer pricing adjustment was made for the balance amount only.

6. During the year under consideration, i.e., in the year relevant to AY 2010-11, the assessee claimed deduction of Rs.2.80 crores u/s 40(a), since it has deducted tax at source from the payments made during this year. It was allowed by the AO. However, Ld CIT took the view that the disallowance made in AY 2009-10 should be considered as having been made u/s 92CA as Transfer pricing adjustment (and not u/s 40(a)) and hence the said amount cannot be deducted during the year under consideration.

7. The Ld A.R submitted that the amount of Rs.2.80 crores represented "provision for expenses" made by the assessee in AY 2009-10 for management services. Since no TDS was deducted from it, the assessee voluntarily disallowed the same u/s 40(a) of the Act. In AY 2010-11, the assessee has deducted TDS at the time of making payment and hence the amount disallowed in the

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preceding year was claimed as deduction during the year under consideration in terms of sec.40(a) of the Act. He submitted that even though the TPO had determined ALP of management services at NIL in AY 2009-10, yet he did not make any separate T.P adjustment u/s 92CA in respect of above said amount of Rs.2.80 crores, since the assessee had voluntarily disallowed the above said amount u/s 40(a) while computing returned income. The A.R submitted that the TPO/AO has nowhere stated that the addition of Rs.2.80 crores was made on account of T.P adjustment, i.e., the AO has accepted the disallowance of the above said amount made by the assessee u/s 40(a) of the Act. The Ld A.R submitted that the assessee has claimed the above said amount of Rs.2.80 crores in this year, since the Tax was deducted at source while making payment this year. The claim of the assessee is in accordance with the provisions of sec.40(a) of the Act. Accordingly, he submitted that there was no error in the claim made by the assessee in this year, i.e., in AY 2010-11.

8. The Ld A.R further submitted that the T.P adjustment made by the TPO determining ALP of management charges at NIL in respect of remaining amount has been challenged by the assessee and the appeal is pending before the Tribunal. He submitted that, in AY 2005-06, the TPO has allowed partial relief on management cross charges, meaning thereby, ALP was not determined at NIL in that year. Accordingly, he submitted that there is no error in the assessment order on this issue and hence the Ld CIT was not justified in passing revision order on this issue.

9. On the contrary, the Ld DR supported the order passed by Ld CIT.

10. We heard rival contentions and perused the record. The details relating to computation of “administrative and business support services” are given in page 287 of the paper book as under:-

Table-A Breakup of Administrative and Business Support Services

<i>Particulars</i>	<i>Exchange rate</i>	<i>Amount in Rs.</i>
<i>3M APAC Gross amount</i>	<i>46.64</i>	<i>1,15,72,393</i>
<i>3M Company US Gross amount</i>	<i>46.64</i>	<i>17,41,46,933</i>
<i>Withholding tax</i>	<i>46.64</i>	<i>4,20,508</i>
<i>Service Tax</i>		<i>1,91,29,089</i>
<i>Total expenses</i>		<i>20,48,48,415</i>
<i>Provision as on March 2010</i>		<i>5,61,02,611</i>
<i>Others</i>		<i>41,94,041</i>
<i>Provision as on March 2009</i>		<i>(2,80,00,000)</i>
<i>Amount debited to Profit and Loss account</i>		<i>23,71,45,067</i>

A perusal of the same would show that the assessee is making year end provision every year. The provision made in one year is reversed in the succeeding year. There is no dispute that the assessee has voluntarily disallowed the year end provision u/s 40(a), since no tax was deducted at source from the provision for Administrative and management support services made by the assessee. Under accounting principles also, when the actual payment is fully debited to the Expenditure account, the provision made in the preceding year shall be credited, so that actual payment is offset against the provision so created in the preceding year. The provision for expenses so created is allowable as deduction in the normal course. However, due to non-deduction of tax at source, the assessee has voluntarily disallowed the same u/s 40(a) of the Act in AY 2009-10. When the TDS was deducted on the actual payments made during the year under consideration, the assessee has claimed the amount disallowed in the immediately preceding year as deduction as per the provisions of sec.40(a) of the Act.

11. It is the case of the Ld CIT that, in AY 2009-10 no separate addition due to TP adjustment was made in respect of Rs.2.80 crores (even though the TPO had determined the ALP at NIL), since the assessee had voluntarily disallowed the same u/s 40(a) of the Act. Accordingly, it is the case of the Ld CIT that the disallowance should be considered to have been made u/s 92CA also.

12. We are afraid that the view expressed by Ld CIT on this issue may not be correct. While computing total income, the disallowance made u/s 40(a) has been accepted by the AO in AY 2009-10. The view of Ld CIT is stated as under in the revision order passed for AY 2010-11:-

“While computing TP additions for the AY 2009-10 an amount of Rs.2,80,00,000/- was not included to the TP adjustment considering the fact that the same was already disallowed u/s 40(a) of the IT Act which is specified in TPOs order. The said amount should have been added back to income as TP adjustment and not u/s 40(a) of the IT Act.”

After making the above said observations, the Ld CIT has held as under:-

“Accordingly, the allowance of this amount on payment basis in AY 2010-11 is not in order and resulted in short computation of income of Rs.2,80,00,000/- resulted in short levy of tax to the extent of Rs.1,42,75,800/-.

It can be noticed that the Ld CIT is taking a particular view on the assessment order passed for AY 2009-10, meaning thereby, he is finding fault with the assessment order passed for AY 2009-10. After observing so, he is revising the assessment order passed for AY 2010-11. These aspects clearly show that the Ld CIT has not actually pointed out any error in the assessment order passed for AY 2010-11. There should not be any dispute that the claim of the assessee is as per the provisions of sec. 40(a) of the Act.

13. We notice that, under Explanation to section 92(1) of the Act, the allowance for any expense shall also be determined having regard to arms length price. Since the TPO has determined the arms length price at NIL in AY 2009-10, the entire claim made in the profit and loss account should have been considered as transfer pricing adjustment. However, the TPO has reduced the amount disallowed u/s 40(a) and made transfer pricing adjustment for the balance amount only in AY 2009-10. The question of making disallowance u/s 40(a) shall apply, only if the relevant expenditure was found to be allowable, but for the provisions of sec.40(a). Hence the action of TPO in reducing the T.P adjustment amount by the disallowance made u/s 40(a) may not be right and in that case, the error lies in AY 2009-10. Having not done so, the Ld CIT should not find fault with the claim of the assessee made u/s 40(a) of the Act on the reasoning that the TDS has been made in this year, i.e., in AY 2010-11.

14. For the above said reasoning, the order passed by Ld CIT(A) on this issue cannot be sustained.

15. The next issue sought to be revised relates to “Foreign services Employees expenses”. The TPO had determined ALP of intra group services at NIL. In the annual report, the assessee had furnished details of Support services/Corporate management Services as Note no.16 in Notes to Accounts. The assessee has also given a note as “Foreign Services Employees Expenses amounting to Rs.2,56,47,834/- are included in Employees Cost”. The Ld CIT has taken the view that above expenditure is part of “Support services/Management Fees” and hence its ALP should be taken as NIL, which will result in an addition of Rs.2,56,47,834/-.

16. The Ld A.R submitted that some of the seconded employees have drawn full/part of salary in their home country and the assessee has reimbursed the same to the AE. Hence those payments, in effect, are salary only and accordingly included in the Salary expenses. The Ld AR submitted that the assessee had adopted TNM method to benchmark other international transactions and the same has been accepted to be at arms length by the TPO. During the course of TP proceedings, the TPO had asked query on the reimbursement of expenses, i.e, whether any of reimbursements have been claimed without routing the same through Profit and Loss account and it was duly replied. Hence the TPO has applied his mind on this issue, accepted the same as part of TNM method exercise and found the same to be at arms length. Accordingly, he contended that the Ld CIT was not justified in passing revision order on this issue also.

17. We heard Ld D.R on this issue and perused the record. The Ld AR also took us through the query posed by the TPO during the course of TP proceedings. The TPO has specifically asked whether the assessee is claiming any reimbursements as expenses without routing though the Profit and Loss account? The assessee has also furnished reply to the same stating that reimbursement claims have been routed through the Profit and Loss account, meaning thereby, the TPO has specifically applied his mind on this issue. Hence the TPO has examined this issue and has taken a possible view, in which case, the revision order passed by Ld CIT on this issue is also liable to be quashed.

18. In the case of Malabar Industrial Co Ltd vs. CIT (243 ITR 83), the Hon'ble Supreme Court has expressed the view that the assessment order cannot be considered to be prejudicial to the interests of revenue, if the AO has taken a plausible view.

19. In view of the foregoing discussions, we are of the view that the impugned revision order is not sustainable in law. Accordingly, we set aside the same.

20. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 24th Aug, 2021

Sd/-
(Beena Pillai)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 24th Aug, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.