

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "A", HYDERABAD**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SMT. ASHA VIJAYARAGHAVAN, JUDICIAL MEMBER**

ITA No. 842/HYD/2012
Assessment Year: 2007-08

M/s Vijai Electricals Ltd.,
Hyderabad.
(PAN - AAACV7259B)

... Appellant

Vs.

Addl. Commissioner of Income-tax,
Range - 3, Hyderabad.

...Respondent

Appellant by : Shri S. Rama Rao
Respondent by : Shri M. Bhupal Reddy

Date of Hearing : 08/05/2013
Date of Pronouncement : 31/05/2013

ORDER

PER ASHA VIJAYARAGHAVAN, J.M.:

This appeal preferred by the assessee is directed against the order of CIT-III, Hyderabad dated 26/03/2012 passed u/s 263 of the Act, for the assessment year 2007-08.

2. The assessee company M/s Vijai Electricals Ltd. is engaged in the business of manufacture and sale of distribution and power transformers and rural electrification projects on turn key basis. The assessee filed its return of income for the assessment year 2007-08 on 30/10/2007, declaring a total income of Rs. 208,40,81,674/-. The scrutiny assessment was completed u/s 143(3) on 17/12/2009, determining total income at Rs. 211,68,51,117/-. The CIT perused the assessment records and was of the opinion that the order passed by the AO u/s 143(3) is

erroneous and prejudicial to the interests of the revenue, hence, the CIT proceeded to pass the order u/s 263 and held that during the year under consideration the assessee company had invested Rs. 2118.84 lakhs in its subsidiaries outside India as below:

| S.No. | Name of the subsidiary | Amount invested in Rs. (lakhs) |
|-------|--|--------------------------------|
| 1 | Vijai Electrical Do Brasil Ltd | 2114.82 |
| 2 | Vijai Electricals Mexico SA DE CV | 2.01 |
| 3 | Vijai Electricals Mexico Services SA DE CV | 2.01 |
| | Total | 2118.84 |

The CIT(A) held that the above transactions are International Transactions as per section 94B of the Income-tax Act. The report in Form No. 3CEB as required u/s 92E of the Income-tax Act, 1961 was not enclosed to the return of income. The AO had completed the assessment without examining/referring these transactions to the Transfer Pricing Officer to determine whether these investments were made at arm's length.

3. The CIT(A) issued show cause notice u/s 263 dated 21/09/2011 and, in reply, the assessee filed its written submissions dated 03/10/2011 wherein it was submitted that the company was of the opinion that these transactions are not in the nature of transactions referred in section 92B. It was contended that Arm's length price cannot also be determined in this case as per section 92-C of the IT Act, 1961. However, the CIT after perusing the explanation filed by the assessee held that the same was not acceptable and verification is needed as to whether the transaction done is at arm's length price. Therefore,

the CIT set aside the assessment made on 17/12/2009 and directed the AO to do the assessment afresh after referring these transactions to the TPO as per the provisions of section 92C for determining the arm's length price.

4. Aggrieved, the assessee is in appeal before us and raised the followed grounds of appeal:

"1. The order of the learned CIT is erroneous both on facts and in law.

2. The learned CIT erred in holding that the order of assessment passed by the Addl. CIT, Range-3, Hyderabad is erroneous and prejudicial to the interests of the revenue.

3. The learned CIT erred in holding that the transaction of investments made by the appellant are governed by the provisions of sec. 92E of the IT Act. The learned CIT ought to have observed that the transactions mentioned by him are not the international transactions within the meaning of the provisions of sec. 94B and there is no requirement of filing any audit report as required in Form No. 3CEB.

4. The learned CIT erred in holding that the order is prejudicial to the interests of the revenue when the transactions were not dealt in accordance with the provisions of section 92B/92C of the IT Act.

5. The learned CIT erred in holding that there is any error in the order which is prejudicial to the interests of revenue and further erred in setting aside the assessment made.

6. The learned CIT erred in directing the AO to refer the transactions to the TPO as per the provisions of sec. 92C of the IT Act.

7. The learned CIT erred in holding that there are any international transactions with regard to computation of income as contemplated under Chapter X. The learned CIT ought to have seen that the order passed by the AO is correct and justified.

8. The learned CIT erred in setting aside the order when there being no prejudice caused to the department."

5. Before us, the learned counsel for the assessee submitted that the only transaction were capital investments made by the company and the transactions are not international transactions within the meaning of provisions of section 94B of the IT Act and

hence, there was no requirement of filing any audit report in Form No. 3CEB. The learned counsel further contended that the CIT erred in directing the AO to refer the transactions to the TPO as per the provisions of section 92-C of the IT Act and that the investment is merely investment of capital and not a sale transaction as the investment does not give rise to any international transaction with regard to computation of income as contemplated under Chapter X. The learned counsel submitted that the order u/s 263 is to be set aside as the order of the AO is neither erroneous nor prejudicial to the interests of the revenue.

6. The learned counsel invited our attention to page 86 of the paper book, which is the reply given to the CIT with respect to notice u/s 263 of the IT Act, and the same is extracted below:

"2. Transaction with subsidiaries outside India Rs. 2118.84 lakhs.

We bring to your kind notice that the amounts representing Rs. 2118.84 lakhs is towards investment in share capital of the subsidiaries outside India as mentioned in your notice.

We bring to your kind notice that, we are of the opinion that the transaction are not in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction as mentioned in section 92B of the IT Act, 1961. As the transaction are not in the nature of transaction referred to in section 92B of the IT Act, 1961, the arm's length price has not been determined as per section 92C of the IT Act, 1961.

We request you to kindly consider the above and as the order passed u/s 143(3) of the IT Act, 1961 dated 17/12/2009 for the AY 2007-08 is not erroneous or prejudicial to the interests of the revenue. Kindly drop the revision proceedings initiated u/s 263 of the IT Act, 1961 and oblige."

7. The learned counsel referred to the Circular No. 14, dated 22/11/2011, and submitted that section 92B(1) is applicable only when income is chargeable and not for capital investment. The relevant portion of the Circular is extracted below:

"55.6 The substituted new sections 92A and 92B provide meanings of the expressions 'associated enterprise' and 'international transaction' with reference to which the income is to be computed under the new section 92. While subsection (1) of section 92A gives a general definition of associated enterprises, based on the concept of participation in management, control or capital, sub-section (2) specifies the circumstances under which the two enterprises shall be deemed to be associated enterprises.

55.7. Section 92B provides a broad definition of international transaction, which is to be read with the definition of transaction given in section 92F. An international transaction is essentially a cross border transaction between associated enterprises in any sort of property, whether tangible or intangible, or in the provision of services, lending of money etc., At least one of the parties to the transaction must be a non-resident. The definition also covers a transaction between two non-residents, where for example, one of them has a permanent establishment whose income is taxable in India.

55.8. Sub-section (2) of section 92B extends the scope of the definition of international transaction by providing that a transaction entered into with an unrelated person shall be deemed to be a transaction with an associated enterprises, if there exists a prior agreement in relation to the transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined by the enterprise. An illusion such a transaction could be where the assessee, being an enterprise resident in India, exports goods to an unrelated person abroad, and there is a separate arrangement or agreement between the unrelated person and an associated enterprise which influences the price at which the goods are exported. In such a case the transaction with the unrelated enterprise will also be subject to transfer pricing regulations".

8. The learned counsel relied upon the decision in the case of Dana Corporation RE, 321 ITR 178 (AAR) wherein it has been held as follows:

"Section 92 is not an independent charging provision. The expression 'income arising' in the opening words of section 92 postulates that income has arisen under the substantive charging provisions of the Act. If by application of the provisions of section 45 read with section 48, which are integrally connected one with the other, income cannot be said to arise, section 92 does not come to the aid of the Revenue even though it is an international transaction. Section 92 obviously is not intended to bring in a new head of income or to charge tax on income which is not otherwise chargeable under the Act."

9. The learned counsel also relied upon the decision in the case of Amiantit International Holding Ltd., 322 ITR 678 (AAR) wherein it was held that in a case where income was not chargeable at all transfer pricing provisions of section 92-B(i) of the IT Act would not apply.

9. The learned DR, on the other hand relied upon the decision ITAT Mumbai Bench "B" in the case of Board of Control for Cricket in India Vs. DIT (Exemption), [2005] 96 ITD 263 (Mum) wherein it was held that *'the said order did not show that the AO had considered or applied his mind to the factual and legal aspects of the case. It was a stereotyped order which simply accepted what the assessee stated in its application without proper examination of the factual and legal aspects of the case. An order may be rendered erroneous due to error in approach, error in computation, error in applying the relevant law or facts or error in selecting a principle which would not govern the fact situation. Likewise, arbitrary exercise of quasi-judicial power without due consideration of the relevant aspects of the case would also render the resultant order erroneous within the meaning of*

section 263. In this view of the matter, the submissions of the assessee that the order passed by the AO u/s 195(2) was not erroneous within the meaning of section 263 could not be upheld. The said order was an erroneous order capable of being revised u/s 195(2) provided other conditions of section 263 were also fulfilled.' The learned DR also relied upon in the case of CIT Vs. Sri Mahasastha Pictures, [2003] 263 ITR 304 (Mad.).

10. We have considered the rival submissions, perused the record and have gone through the orders of the authorities below as well as decisions cited. In our opinion, the amount representing 2118.84 is towards investment in share capital of the subsidiaries outside India as the transactions are not in the nature of transactions referred to section 92-B of the IT Act and the transfer pricing provisions are not applicable as there is no income. Accordingly, we set aside the order passed by the CIT u/s 263 and that of the AO is restored and the grounds raised by the assessee in this regard are allowed.

11. In the result, appeal of the assessee is allowed.

Pronounced in the open court on 31st May, 2013.

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Sd/-
(ASHA VIJAYARAGHAVAN)
JUDICIAL MEMBER

Hyderabad, Dated: 31st May, 2013.

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Copy to:-

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- 2) Addl. CIT, Range - 3, Hyderabad.*
- 3) CIT-III, Hyderabad*
- 4) The Departmental Representative, I.T.A.T., Hyderabad.*