

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : 'B' NEW DELHI**

BEFORE SHRI K.G.. BANSAL, ACCOUNTANT MEMBER AND
SHRI C.M. GARG, JUDICIAL MEMBER

I.T.A No. 5124/Del/10

Asstt. Year – 2007-08

Education Australia Limited – India	Vs. Deputy Director of Income-Tax, Circle 1(2),
C/o Price Water House Coopers Private Limited	International Taxation, New Delhi.
11A, Sucheta Bhawan, 1 st Floor, Vishnu Digambar Marg, New Delhi – 110 002.	
AABC10333G	
(Appellant)	(Respondent)

Appellant by: Shri K.M. Gupta, Advocate

Respondent by: Shri J.S. Ahlawat, Sr. DR

Date of hearing : 20-04-2012

Date of pronouncement : 18-05-2012

ORDER

PER K.G. BANSAL, AM:

The facts of the case, as mentioned in the asstt. order , are that the assessee filed its return on 31.10.2007 declaring NIL income. Thereafter, another return was filed on 21.8.2008 declaring NIL income. It may be

mentioned here that the revised return in Form No. ITR-V showed NIL income, but the "statement of income" accompanying it showed total income of ₹ 2,04,20,327/-. The statement also shows that tax payable at ₹ 1,04,22,802/-, which was paid on 8.8.2008. The return was processed u/s 143(1) of the Income Tax Act 1961 (the Act) on 20.3.2009 at total income of ₹ 2,04,20,330/-. Subsequently the case was selected for scrutiny by issuing notice u/s 143(2) and a questionnaire. The assessee is a non-profit company set up in Australia and it is owned by 38 Australian Universities. It is engaged in the business of providing services to students who desire to study in Australia. For achieving this purpose, it inter-alia offers advice and information on course, study destination, application service in respect of over 300 Australian Educational Institutions, compilation of documents for the student visa applications, accommodation advice etc. These services are provided to the students free of cost. The case of the assessee had been that it set up liaison offices (LO) in New Delhi, Chennai, Mumbai, Chandigarh, Bangalore, Ahmedabad and Hyderabad with the previous approval of the Reserve Bank of India (RBI) conveyed in its letter dated 29.6.1995. The LO were not allowed to undertake any business activity as it was authorized solely to carry out liaison activities, i.e. , to assist students in India for enrolling themselves in Australian Educational Institutions. Therefore, the expenditure of the LO was met out of remittances received through banking channel. However, this position was not accepted in past, as profit was attributed to the activities carried on by the LO in India. As per Transfer Pricing (TP) study conducted for this

year, the profit was computed on cost plus basis by taking a mark up of 15% of the cost. The income shown in the statement of income accompanying the revised return was declared on the aforesaid basis. The AO proposed two additions in the draft, one regarding profit attributable to the expenditure incurred on representatives of Australian Educational Institutions for visiting India for the purpose of enrolment of students. Assessee had furnished the details of such visits in the immediately preceding year. However, such details were not provided in this year. On the basis of figures of last year, the AO estimated that 175 persons visited India in this year. The interviews lasted for 10-12 days and such interviews are conducted twice a year. The expenditure incurred on these persons was worked out at ₹ 4,79,25,675/-. This amount was added to the expenditure incurred by the LO and profit was computed accordingly. The second issue is in respect of head office expenses. It has been held that the assessee is offering income for taxation on cost plus basis, therefore, general and administrative cost incurred by head office for running the LO has to be worked out. By taking analogy from section 44C, this expenditure was computed at ₹ 10,21,016/-. This expenditure was also included in expenditure for the purpose of computing the profit.

1.1 The additional cost as aforesaid has been worked out at ₹ 4,89,46,691/-. 15% on this cost, amounting to ₹ 73,42,003/- has thus been added to the total income, thereby computing it at ₹ 2,77,62,330/-

1.2 The assessee objected to the draft order. Therefore, the matter was referred to Dispute Resolution Panel (DRP), DRP found the objections of

the assessee to be untenable. Consequently, the total income of the assessee has been computed at ₹ 2,77,62,330/-.

2. Aggrieved by this order, the assessee has filed appeal before us. It has taken up 3 grounds.

2.1. Ground No. 3 is against initiation of penalty proceedings u/s 271(1)© of the Act. This ground is not appealable before us and it has also not been argued by the Ld. Counsel for the assessee. Therefore, this ground is taken as dismissed. Ground No. 1 has three parts. It has been explained to us by the Ld. Counsel that in this ground, the assessee has challenged the action of the AO in which expenses of representatives of Australian Education institutions have been attributed to the assessee and profit has been computed thereon. Ground No. 2 is against attributing head office expenses to the LO and computing profit thereon on cost plus basis.

3. Before us, Ld. Counsel referred to paragraph No. 8 of the asstt. Order, in which the issue regarding visit of representatives of Australian Educational institutions has been discussed and the cost has been worked out at ₹ 4,79,25,675/-. For the sake of ready reference, this paragraph is reproduced below :-

8. *"It remains a fact that the assessee who is owned by 38 Australian Universities and providing service to over 300 Australian Education Institutions cannot conduct the interaction and interviews with the prospective students seeking admission in Australian Education Institutions, without the support of representative / visitors from Australian Institutions. But inspite of repeated requisitions the assessee kept on denying having incurred any expenses on visitors from Australia and did not provide the list of visitors and*

details of expenses incurred on them in India. As the activities of the assessee remain the same and admission rush to Australia is growing from year to year, in the absence of requisite details, I take the figure of 175 persons on estimate basis who visited India from Australia during A.Y. 2007-08. As the interviews lasted for 10 to 12 days which are conducted twice a year, following the rationale of the assessment order for A.Y. 2006-07, I take the expenses on account of their lodging and boarding expenses @ US\$ 450 per person per day which come to US\$ 1,102,500 for stay of 14 days. It is held that cost incurred on the visit of these personnel is required to added to the cost of the Liaison Office. The total cost works out to ₹ 4,79,25,675/- (Taking the rate of US\$ 1 = ₹ 43.47)."

3.1 He drew our attention to the order of Ld. CIT(A) in the case of the assessee for asstt. Year 2006-07, in which it has been held that the expenses of representatives of Australian Education Institutions, incurred in India, were borne by the universities themselves. This finding was arrived at after obtaining the remand report of the AO. It is argued that in view of this decision, no addition can be made in the hands of the assessee on this account by attributing the expenditure to the assessee. For the sake of ready reference, paragraph No. 7 of the order of the Ld. CIT(A) is reproduced below :-

7. *"I have considered the submissions of the appellant as well as that the Ld. AO. As mentioned above, the AO has stated in its remand report that he has no objection in admitting the additional evidence furnished by the appellant, i.e. certificates furnished by Australian University to certify that cost of boarding and lodging of their representatives were borne by themselves and not by the appellant. Moreover, no specific request was made by the AO during the assessment proceedings to produce such evidence. Therefore, the additional evidence furnished by the appellant during the course of appellate proceedings is admitted. On the basis of such certificates by the appellant, it is evident that the cost of boarding and lodging of representatives of Australian University was borne by the Universities themselves and appellant had no role to play in that regard. It is also not disputed that the cost of boarding and lodging incurred upon*

the employees of the head office had already been included in the cost base while applying mark up of 15% to arrive at the income of the appellant for the year. Since the appellant had not rendered any services in connection with the boarding and lodging of representatives of Australian Universities, Educational Institutions, I find no reasons to include the cost of boarding and lodging of representatives of Australian University/Educational Institutions in the total cost base of the appellant while applying mark up of 15% to arrive at the income. Therefore, Ld. AO is directed to exclude the amount of ₹ 4,69,34,181/- from the total cost, while calculating income of the appellant at the net margin rate of 15% of total cost."

3.2 Finally he drew our attention towards the decision of the Ld. DRP, rendered on 20.7.2010. This decision has been rendered prior to the order of the Ld. CIT(A) made on 22.8.2011. Ld. DRP has interalia mentioned that the AO, on the basis of available information, estimated that 175 representatives visited India in this year and the interviews lasted from 10-12 days conducted twice a year. The AO has made addition following the rationale of the addition made in astt. Year 2006-07. It is argued that the benefit of the decision of the Ld. CIT(A) was not available to the Ld. DRP and the addition was sustained by following the logic furnished by the AO in the order for asstt. Year 2006-07. This logic no longer survives as factual position is that the expenses have been borne by Australian Educational Institutions.

4. In reply, Ld. CIT DR page numbers 71 to 72 of the paper book, dealing with functions performed by the assessee in Australia and India. In so far as India is concerned, it is submitted that the LO undertake activities in relation to student identification and recruitment process in India. It is also engaged in promoting Australian Educational Institutions and training services in India. The assessee was given specific opportunity

to state as to how many representatives visited in India in this year and the amount of expenditure incurred on their stay in India. Such information was not supplied. The assessee has also not furnished any evidence that the expenditure was borne by Australian Educational Institutions. The decision for asstt. Year 2006-07 was rendered by the Ld. CIT(A) on the basis of crucial evidence filed in that year to the effect that the expenditure was borne by Australian Institutional Institutions. Assessee has also not furnished copies of agreement entered into between it on one side and Australian Educational Institutions on the other. Therefore, in view of complete lack of evidence in the matter, the AO made a reasonable estimate of the expenditure incurred and income arising therefrom on the basis of cost plus method.

5. We have considered the facts of the case and submissions made before us. The facts are that the assessee maintains offices in India which are known as LO under Foreign Exchange Management Act. These offices are not permitted to carry out any business activity leading to earning of income. There is no evidence on record that the assessee violated the terms and conditions on which the LO were permitted to be operated by the RBI. This issue whether the LO constitute Permanent Establishment (PE) or not has come to an end when it has been admitted by the assessee that its income may be computed on cost plus basis. Representatives of Australian Educational Institutions visit India for the purpose of admitting students to their institutions. In the proceedings of asstt. Year 2006-07, assessee was able to bring on record evidence from

the educational institutions that the institutions themselves incurred the cost of boarding and lodging in India of their representatives. Such evidence could not be filed in this year. However, it does not mean that the assessee has incurred the cost of boarding and lodging. The reasonable view still will be that as in earlier year the expenditure was incurred by educational institutions unless some evidence is brought on record to prove that the assessee, in fact, incurred the cost in this year. Further, the Ld. Counsel has made a statement at bar that the appellate order for asstt. Year 2006-07 has been accepted by the revenue and no appeal has been filed against this order. In such a situation, it will be appropriate to assume that the expenditure has not been incurred by the assessee in this year also looking to the factual position that the expenditure was incurred by the institutions last year. Therefore, it is held that there is no evidence on record to come to a conclusion that assessee incurred the expenditure in respect of stay of representatives of Australian Educational Institutions in India. Accordingly, it is held that no income is attributable to the Indian offices on this ground.

5.1. In the result ground No. 1 is allowed.

6. Ground No. 2 is in relation to expenses incurred by the head office in respect of operations conducted in India. The facts are that the expenditure has been attributed to Indian offices by taking analogy from section 44C of the Act. This provision deals with allowance of expenditure incurred by Head office in relation to offices in India. This provision does

not raise a presumption that such expenses have been incurred by Indian offices.

6.1. This issue also arose in the proceedings of asstt. year 2006-07. Ld. CIT(A) held that the assessee can be taxed in India only in respect of income arising to it from activities in India and not in respect of services rendered by head office. For the sake of ready reference para 7.1 of this finding is reproduced below :-

7.1 *“Similarly, the Ld. AO has not brought out any fact or evidence on record to establish that any other cost was incurred by the Head Office of the appellant in respect of its activities in India. Moreover, the appellant can only be taxed in India in respect of the income derived by it for its activities in India and not for the services rendered by its Head Office, if any, in Australia. Therefore, I am inclined to agree with the appellant in this regard, i.e. it is held that the Ld. AO was not justified in including the amount of ₹ 13,30,954.- on notional basis in the total cost incurred by the appellant in India to arrive at the income at the net margin rate of 15% of such total cost. Therefore, the Ld. AO is directed to exclude the amount of ₹ 13,30,954/- from the total cost base to arrive at the income of the appellant.”*

7. Ld. Counsel for the assessee submitted that the assessee has not claimed any deduction in respect of alleged head office expenditure. Even if it is assumed that such expenditure has been incurred, deduction will have to be allowed for the same u/s 44C. However, he strongly relied on the findings of the Ld. CIT(A) that expenditure incurred by the head office cannot form the basis for computing income derived from activities in India.

7.1 In reply, Ld. DR relied on the finding of the AO.

8. We have considered the facts of the case and submissions made before us. The finding of the AO is that expenditure incurred by the head office will have to be allocated to the Indian offices. There has been no allocation made by the assessee. The income is being offered for tax on cost plus basis, therefore, the general and administrative expenditure incurred by the head office for running India offices has to be considered for working out the cost base. The fact of the matter is that the Indian offices have not incurred any expenditure. If any income accrues on account of expenditure incurred by the head office, it will be the income of the head office and not Indian offices. At the same time, if any expenditure is attributed to Indian offices deduction of the expenditure will have to be allowed. Thus seen from any angle the revenue does not have any case in this matter.

8.1. In the result ground No. 2 is also allowed.

9. The result of the discussion is that the appeal of the assessee is partly allowed as discussed above.

Sd/-

sd/-

[C.M. GARG]

[K.G. BANSAL]

JUDICIAL MEMBER

ACCOUNTANT MEMBER

Dated:

Veena

Copy forwarded to: -

1. Appellant
2. Respondent

ITA No. 5124/Del/10
Asstt. year 2007-08

3. CIT
4. CIT (A)
5. DR, ITAT TRUE COPY

By Order,
Deputy Registrar, ITAT