IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : 'E' NEW DELHI

BEFORE SHRI K.G. BANSAL, ACCOUNTANT MEMBER AND

SHRI C.M. GARG, JUDICIAL MEMBER

I.T.A No. 5466/Del/11

Asstt. Year – 2007-08

Headstrong Services India Pvt. Ltd., 103, Ashoka Estate, Barakhamba Road, New Delhi 110 001 AABCT7650D	Vs.	ACIT, Circle-12(1) New Delhi.
(Appellant)		(Respondent)

Appellant by: Shri G.C. Srivastava & Shri Manoneet Dalal, Advocate

Respondent by: Mrs. Renu Jouhri, CIT (DR)

Date of hearing : 20-6-2012

Date of pronouncement : 17-07-2012

ORDER

PER K.G. BANSAL, AM:

In this appeal, the assessee has taken up 14 grounds. Ground Nos. 1 & 2 are general in nature. Ground Nos. 3 to 7 deal with adjustment made by the AO in the total income on account of "transfer pricing". Ground Nos. 8 to 10 deal with other additions made to the total income returned by the assessee. Ground Nos. 11 to 14 are in respect of charging of interest and initiating penalty u/s 271 (1)©.

2. Briefly the facts are that the return was filed on 23.6.2008 declaring total income of ₹ 30,64,480/-. Assessment proceedings were initiated by issuing statutory notice u/s 143(2) of the Act on 1.5.2009, which was served on the assessee. Thereafter, questionnaire was issued along with statutory notice u/s 142(1). The draft order was made on 31.12.2010 at total income of ₹ 17,66,84,460. The assessee objected the draft order. The objections were heard by the DRP-I, New Delhi. Finally order u/s 143(3) read with section 144(c) of the Act was passed on 24.10.2011. Determining the total income at ₹ 14,56,46,530/-. Aggrieved by this order, the assessee is in appeal before us.

3. As mentioned earlier, ground Nos. 1 & 2 are general in nature. In ground No. 1 it is mentioned that the order passed by the TPO, the draft order passed by the AO and the final order passed by the AO in pursuance of the directions of Ld. DRP are bad in law. In ground No. 2 it is mentioned that the AO erred in determining the total income at ₹ 14,56,46,530/- against the returned income of ₹ 30,64,480/-. These ground are general in nature and they were not argued by the Ld. Counsel for the assessee. Therefore, these grounds are dismissed as not pressed.

4. In ground Nos. 3 to 7, various averments have been made against enhancement of the income by an amount of ₹ 13,54,69,266/- on account of “transfer pricing adjustment” made in respect of international

transactions with associated enterprises (AEs). Some grounds are narrative and argumentative also and thus they are not in accordance with ITAT Rules. These grounds are decided on the basis of submissions made before us.

4.1. In this connection, the Ld. Counsel filed a chart regarding 25 comparable companies on the basis of which transfer pricing adjustment was made. In respect of 10 such comparables, information was obtained by the AO by issuing notices u/s 133 (6) of the Act. The general observation made in the chart in respect of these comparables is that the use of instrument of notice u/s 133(6) for gathering information is inappropriate. However, the Ld. Counsel could not substantiate the aforesaid observation. The case of the Ld. CIT(DR) is that the AO can use all instruments available in the Act for bringing relevant information on record for determining the total income. Having considered submissions from both the sides, we are of the view that there is no substance in the argument that the AO cannot collect information about comparables by issuing notices u/s 133(6). Therefore, this submission is rejected.

4.2 The second argument is that in respect of 20 companies, of which information was obtained u/s 133 (6), the same was not put across to the assessee so that it could file its objections as to whether the cases are comparable or not and whether any adjustment is required to the book result of these companies for bringing them as near as possible to the

case of the assessee. It is argued that non-sharing of the information with the assessee has led to violation of the principle of natural justice. The assessee was prevented from stating its case on the comparables for want of information obtained by the AO directly from the companies. The Ld. CIT(DR) could not rebut this argument. However, it has been argued by her that any lacuna in the assessment order on account of this failure can be cured if the matter is restored to the file of the AO. We have considered this matter. Such issue arose earlier before the 'A' bench of Delhi Tribunal in the case of Adobe Systems India Pvt. Ltd. in ITA No. 5693(Del)/2011 for assessment year 2007-08. The issue has been decided in paragraph No. 4 of this order, which is reproduced below :-

> *"4. We have considered the facts of the case and submissions made before us. In the light of the decision in the case of Genisys Integrating Systems (India) Pvt. Ltd. (supra) and also otherwise we are of the view that any information obtained in the course of assessment proceedings has to be supplied to the assessee for its objections, if any. The absence of doing so leads to violation of fundamental principle of natural justice. In view thereof, the matter is restored to the file of the AO with a direction to supply whatsoever information he wants to use against the assessee to it, grant it reasonable opportunity of being heard and thereafter pass a fresh assessment order as per law."*

4.2.1 As a view has already been taken by the Tribunal in the aforesaid case and in the case of Ameriprise India Pvt. Ltd. in ITA No. 5694/Del/2011 for assessment year 2007-08 dated 26.3.2012, we are bound the follow the view. Therefore, it is held that it was incumbent on the AO to supply the information to the assessee, obtain its objections, if any, and pass order after taking into account the information and the objections of the assessee. This has not been done in respect of 20 comparables.

Therefore, the matter of transfer pricing adjustment is restored to the file of the AO for following proper procedure as mentioned above and decide the matter denovo.

4.3 The assessee has also taken other objections, i.e. super-normal profits in some cases, difference in skills of the employees, R & D expenditure, difference in business models etc. These are matter of details on which the objections can be raised by the assessee, if any, to decide whether the cases are really comparables or not or whether some adjustment is necessary to be made. Thus it is not necessary for us at this stage to go into these submissions.

4.4. In the result, the matter of transfer pricing adjustment is restored to the file of the AO for fresh decision after hearing the assessee. Therefore, these grounds are treated as allowed for statistical purpose.

5. Ground No. 8 is to the effect that the AO erred in disallowing deduction u/s 10A on foreign exchange fluctuation gain and other income of ₹ 71,68,081/-, consisting of excess provision written back and miscellaneous income.

5.1 The Ld. Counsel referred to page No. 6 of PB II, which shows that the assessee earned income of ₹ 68,94,022/- on account of fluctuation in rate of foreign exchange, ₹ 38,532/- on account of excess provision made in earlier years and written off in this year and miscellaneous income of ₹

4,30,527/-. It is submitted that the finding of the AO is that these incomes are not related to export business and therefore they cannot be termed as income derived from the eligible undertaking. It is argued that the finding of the AO is not in consonance with the relevant provisions. Section 10A grants deduction of such profits as are derived by the eligible undertaking from the export of articles, things or computer software for a period of 10 years. It is admitted that sub section (I) does use the word “derived”. However, sub section (4) defines the term “profit derived from export of articles, things or computer software” to mean the amount which bears to the profit of the business of the undertaking the same proportion as the export turnover bears to the total turn over of the business carried on by the undertaking. It is argued that in the light of this definition, what is to be computed at the first instance is the “profit of the business” of the undertaking. While doing so the provisions contained in sections 28 to 44DA come into play. Therefore, such profit has to be computed as normally understood without insisting on proximate connection between the business of undertaking and the profit. In the alternative, it is argued that the claim on account of fluctuation in rate of foreign exchange is in the revenue field as it is relates to export proceeds. Further, in earlier years provisions were made which were found to be in excess of the actual liability by an amount of ₹ 38,532/-. The miscellaneous income is also the income derived from the business of the undertaking.

5.2 In reply, the Ld. CIT(DR) submitted that since the major issue regarding transfer pricing adjustment is to be decided denovo by the AO, this matter may also be restored to his file. In particular, it was mentioned by her that exact details are not available.

5.3 In the rejoinder reply, the Ld. Counsel submitted that the issue is clear and the basis of deduction is same as u/s 80HHC. There is ample authority under that section that proximate connection is not required to be established between the business and the income and the same has to be computed as the profit is computed under the business head.

5.4 We have considered the facts of the case and submissions made before us. There is no dispute that foreign exchange fluctuation gain is in respect of export proceeds, therefore, the amount represents income as it is in the revenue field. It is also clear that the amount, being in the nature of export proceeds, leads to increase in turn - over and total turn – over. Further, the provisions made in earlier years would have reduced the income of the assessee for those years, leading to lower deduction u/s 10A. In this year the sum of ₹ 38,532/- is found to be excess provision which has been credited to profit and loss account. This amount is clearly in the nature of income. The miscellaneous income also represents the income of the business. The only point which we find is that the income is shown at ₹ 4,30,527/- on page No. 6 of the PB, while the Ld. Counsel is mentioned that the income is of the order of ₹ 2.30 lacs. This fact may be

verified by the AO. However, the point of law is clear that the profit of the business has to be found out under the business head and there is no necessity to establish proximate or immediate connection between the business and the profit. Thus, these accounts are includible in the profits of the business. The AO is directed to recompute the deduction accordingly after verifying the figure of miscellaneous income.

6. Ground No.9 is to the effect that the AO erred in disallowing office maintenance expenditure of ₹ 24,08,018/- by holding it to be capital expenditure. The AO has furnished the details of the expenditure under 6 heads and held that all of them are of capital nature. Before the Ld. DRP, the assessee submitted the details of expenditure and the vouchers in letter dated 5.9.2011. The expenditure has been incurred on office maintenance, electricity connection charges, metal detector and scanner trolley, assorted civil work and other expenses. The bills in respect of the expenses were also filed. The Ld. DRP mentioned that looking to the nature of expenses, the action of the AO is upheld but depreciation is to be allowed at appropriate rate.

6.1 Before us, the Ld. Counsel for the assessee submitted that payment in respect of electrical connection does not lead to acquisition of a capital asset. In respect of other items, it was suggested that the matter may be decided on merits by the bench. As in respect of earlier grounds, the submissions of the Ld. CIT(DR) has been that this matter may also be

restored to the file of the AO because the main issue of pricing adjustment is being restored to his file.

6.2 We have considered the facts of the case and submissions made before us. We find that the first expenditure of ₹ 37,584/- is on purchase of door access controller, proximity readers units for central access control panel and power supply units. These are new items and therefore represent capital expenditure. The second expenditure of ₹ 14,09,610/- is for obtaining electrical connection. It is seen from the corresponding order that 600 KVA load was served on 24.8.2006. In this connection security deposit of ₹ 13.16 lacs was paid alongwith supervision charges and system loading charges. The assessee has claimed expenditure only in respect of supervision charges and system loading charges. The expenditure is in the nature of initial expenditure granting benefit of enduring nature to the assessee. Without initialization of electricity connection, no work can be done in office. Therefore, we are of the view that the expenditure is capital in nature. The third expenditure of ₹ 47,942/- is on purchase of carpets which is obviously a capital expenditure as a new asset has been created. Similarly 4th expenditure of ₹ 22,275/- is for purchase of 4 handled metal detector, scanner trolley. This has led to acquisition of a new asset and therefore it is a capital expenditure. In respect of other miscellaneous expenditure for Civil Work etc. no particular reason has been assigned to hold them to be capital expenditure. These expenses amount to ₹ 5,47,895/- and ₹ 3,42,713/- it is

held that these expenses are allowable as business expenditure u/s 37(1). The result is that while expenditure of ₹ 8,90,608/- is held to be revenue in nature, the balance expenditure is held to be capital in nature. Thus this ground is partly allowed.

7. Ground No. 10 is that the AO erred in disallowing debonding charges of ₹ 13,59,057/-. In this connection, it has been submitted before the lower authorities that the amount represents three items – 1) duty paid on loss of laptop of ₹ 70,731/- ; 2) duty paid of ₹ 7,71,021/- on capital asset on debonding the goods and 3) duty paid of ₹ 5,17,305/- on capital goods located at Bangalore for debonding. The submission of the assessee is that it was already in possession of these assets and depreciation was being claimed and allowed. Payment of debonding charges does not lead to creation of any new capital asset, hence the charges should be treated as revenue expenditure. In particular reliance has been placed on the decision of Hon'ble Supreme Court in the case of Empire Jute company of India Ltd. vs. CIT, 124 ITR,1 in which it has been held that apart from the tests of creation of an asset or obtaining benefit of enduring nature, it should also be examined whether the expenditure is in capital field or revenue field.

7.1 Before us, the Ld. Counsel referred to the submissions made before the lower authorities and reiterated that shifting of capital goods from bonded ware house on payment of duty does not create any asset and

does not lead to benefit of enduring nature as the asset remains the same. Therefore, the expenditure is revenue in nature. The argument of Ld. CIT(DR) has been that the matter may be restored to the file of AO.

7.2 We have considered the facts of the case and submissions made before us. The capital goods placed in the bonded area are subject to restrictions that they cannot be sold and they cannot be removed outside the area for use of self. This encumbrance is removed once the goods are cleared from the bonded area on payment of duty. The result is that the assessee can deal with the goods in any manner it desires including sale thereof. Therefore, payment of custom duty for de bonding increases value of the asset and it is required to be added to the costs or written down value, as the case may be. Therefore, this ground is dismissed.

7.3. Ground No. 11 is general in nature against confirming of the additions proposed by the AO by the Ld. DR(P). In absence of any specific argument, this ground is taken as dismissed.

7.4 Ground No. 12 and 13 are against charging of interest under sections 234B, 234D and 244A. The assessment has been set aside on one ground and relief has been granted to the assessee on some other grounds. Therefore, the chargeability of these interests requires a fresh look on making denovo assessment and giving effect to this order.

Therefore, these matters are restored to the file of the AO. The result is that these grounds are treated as allowed.

8. There is no appeal provided for initiating penalty u/s 271(1)(c), therefore ground No. 14 is dismissed.

9. In the result, the appeal is treated as partly allowed as discussed above.

sd/- sd/-

[C.M. GARG] [K.G. BANSAL]

JUDICIAL MEMBER ACCOUNTANT MEMBER

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Copy forwarded to: -

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

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By Order,

Deputy Registrar, ITAT