

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

**BEFORE SH.R.S.SYAL, ACCOUNTANT MEMBER
AND
SMT DIVA SINGH, JUDICIAL MEMBER**

**I.T.A .Nos.-4655 & 4656/Del/2012
(ASSESSMENT YEARS- 2006-07 & 2007-08)**

ADIT, (Intl. Tax.), Circle-1(2), Room No.- 410, Drum Shaped Building, I.P.Estate, New Delhi-110002. (APPELLANT)	vs	M/s I.M. Technologies, C/o-Singhalmatta & Co., B-21, Lajpat Nagar-I, New Delhi-110024. PAN-AAACI8406M (RESPONDENT)
---	----	--

Appellant by	Sh. Peeyush Jain, CIT DR
Respondent by	Sh. S.C.Matta, CA

ORDER

PER DIVA SINGH, JM

By these two appeals the correctness of the separate orders dated 08.06.2012 of CIT(A)-XXIX, New Delhi pertaining to 2006-07 & 2007-08 assessment years has been assailed filed by the Revenue. Both these appeals are being decided by a common order for the sake of convenience.

2. In ITA No.-4655/Del/2012, Ground no.-1 agitating the sole issue Revenue reads as under:-

1. *“On the facts and in the circumstances of the case, The Ld. CIT(A) erred in deleting the upward adjustment of Rs.42,66,611/- to the purchase price of imported goods while computing the arm’s length price of an international transaction entered into by the assessee.”*

3. The facts relatable to the said issue found discussed in the assessment order on which reliance has been placed by the Ld. CIT DR show that the assessee declared a loss of Rs. 17,82,913/- by way of filing its return. The said return was picked for scrutiny after issuance of notice u/s 143(2) etc. The record shows that

the assessee is a foreign company incorporated in Singapore and has been engaged in the business of selling various types of smart cards for GSM Cellular mobile phones and caters to clients operating in the telecom industry. IM Technologies Limited India Branch Office^{3r} (IM India) is a branch of IM Technologies Ltd. (IM Singapore). IM India is stated to be engaged in the business of trading in Sim Cards for GSM cellular mobile phones. The SIM cards are imported from Head Office and resold to local customers in India like Bharti Cellular, Idea Cellular and BPL Mobile etc. The AO took note of the fact that the assessee had disclosed, purchase of trading goods amounting to Rs.9,03,30,047/- and had disclosed a corresponding sales of Rs.9,75,64,994/- from which total income of Rs.9,75,64,994/- was claimed incurring expenditure of Rs.9,94,27,215/- which included purchase of trading goods. Perusing the P&L Account for the year ending 31.03.2006, he concluded that the main cause of loss was the increase in import price of the Sim Cards.

3.1. In view of the above, considering the Transfer Pricing Report submitted by the assessee, he required the assessee to explain why an adjustment of Rs.38,82,528/- should not be made to the income of the assessee. Reliance was placed on the fact that as per the financial information for the financial year 2005-06 available in the case of Compuage Infocom Ltd. it was seen that the gross profit/sales ratio of this company was 11.42% against 7% shown by the assessee. Since the normal gross profit accruing to an unrelated enterprise for the purchase and resale of property in the case of Compuage Infocom Ltd. was 11.4%, the assessee was required to explain why not this gross profit margin not be considered while computing the arms length price as per the provision of Rule 10B(1)(b) of the I.T. Act 1961, Rules 1962. As a result of which it was pointed out the gross profit of the assessee was worked out at Rs.1,06,87,489/- as against the gross profit for the year of Rs.68,04,962/-. He observed that as a result of this the arms length price of the purchase of trading goods would work out to

Rs.8,64,47,19/- as against the purchase price of Rs.9,03,30,047/- which included the customs duty.

3.2. The assessee as per the assessment order is found to have offered a reply dated 17.12.2008 stating that although at the time of TP study, the data available was only of Compuage Infocom Ltd. however now the data of two other companies was also available and the arithmetic mean of the gross profit of the three companies for the financial year 2005-06 works out 6.26% as per the provisions of Rule 10B(4) of the IT Rules. On account of this fact it was submitted that the data placed in the TP Report alone should not only be considered.

3.3. However the said explanation was not accepted as the AO was of the view that the documentation in regard to the above claim should have been maintained by the assessee as per the provision of Section 92D and the documentation can not now be changed. While so holding he took note of the fact that the gross profit margin for the year ended on 31.12.2004 for the assessee was 22.03% whereas for the year ended 31.12.2005 it was 10.61%. The AO held that the arm's length price of the international transaction should be computed by using the gross margin of 11.42%. The addition of Rs.42,66,611/- accordingly was made in the following manner:-

4.2. *"Therefore, it is held that the arm's length gross margin is 11.42%. Due to this, the arm's length price of the international transaction relating to import of goods is computed as below:-*

<i>Sale price of the goods</i>	<i>Rs.97,158,994</i>
<i>Less 11.42%</i>	<i>Rs.11,095,557</i>
<i>Therefore the ALP of purchase</i>	<i>Rs.86,063,436</i>

The arm's length price of international transaction of purchase of goods is Rs.86,063,436/-, as against the purchase price of Rs.90,330,047/- .This result into adjustment of Rs.4,266,611/-.

As the assessee had not computed the arm's length price of the international transaction as per the provisions of law and this resulted into furnishing of inaccurate particulars of income and penalty proceedings u/s 271(1)(c) of the Act are separately initiated."

4. In appeal before the First Appellate Authority, the assessee is found to have raised various arguments assailing that the conclusion of the AO in holding that the loss was on account of excessive import price is incorrect on facts. It was submitted that rather the loss was a result of fall in total sales and the GP rate infact when compared to the earlier year is on a better side. The loss it was stated is due to certain fixed cost which have to be incurred irrespective of the quantum of sales.

4.1. Considering the explanation the CIT(A) held that the branch office in India constitutes the PE of the assessee company in India. The addition made by way of an adjustment was deleted considering the data relied upon by the assessee available in the public domain of the three comparable companies which were relied upon by the assessee in the TP Report relied upon whose data was not available at the time of the TP Study but was available in the public domain during the assessment proceedings.

5. Aggrieved by this the Revenue is in appeal before the Tribunal.

6. The Ld. CIT DR places heavy reliance upon the assessment order. The Ld. AR relied upon the impugned order.

7. We have heard the rival submissions and perused the material available on record. In the light of the facts on record, on a consideration of the same we are of the view that the reliance placed on the data available in the public domain at the time of the assessment proceedings which was not allowed by the AO and ultimately allowed at the Appellate stage cannot be faulted with. It is not the case of the Revenue that the three comparables taken by the assessee in the TP study as comparable were not comparable companies. This aspect not having been disputed, we see no reason why the Revenue should insist upon ignoring the updated relevant data for the period under consideration. Having accepted the fact that these companies taken in the TP study were comparable there can be no right vested in the Revenue to insist upon the incomplete data available at the time of TP study and refuse to look at the updated data available for the relevant period at

the assessment stage. The CIT(A) in appeal has correctly taken the updated data which stand is approved by us. In the afore-mentioned peculiar facts and circumstances, we find no good reason to interfere with the finding arrived at by the CIT(A) on the facts they stand. The speaking finding arrived at by the CIT(A) on facts is upheld. For ready-reference, we reproduce the relevant extract with which we concur:-

5.2. *“The appellant has furnished copy of audited account of branch office in India. P& L a/c shows purchase of trading goods at Rs.9,03,30,047 which is the only international transaction entered into by PE with its non-resident head office. As per provisions of section 92F(iii), PE is an enterprise. P&L a/c shows sale of Rs.9,71,58,994, other income of Rs.4,06,000 and expenses to the tune of Rs.90,73,183 under the head of personnel expenses, operating expenses, depreciation and financial expenses. However, these do not fall under category of international transaction. The appellant had filed TP report before AO in which three set of comparable companies namely Compugate Infocom Ltd., ACI Infocom Ltd. & SES technologies Ltd. were selected. At the time of preparing TP report, current year's date of only Compugate Infocom Ltd. was available. Therefore, the appellant used current year's date and date of preceding two years of Compugate Infocom Ltd. and benchmarked the transaction at average gross profit margin of 8.80% applying RPM as most appropriate method. The RPM method was used because branch office was only acting as distributor without making any value addition to the product. The AO did not allow use of multiple year's data and used only current year's data of Compugate Infocom Ltd. which showed 11.42% as gross profit margin. The AO did not contest the choice of Compugate Infocom Ltd. as comparable or RPM as most appropriate method. The AO applied 11.42% as gross profit margin in case of appellant and determined arm's length price of international transaction at Rs.8,60,63,436 in place of Rs.9,03,30,047 as declared by the appellant and hence made upward adjustment of Rs.42,66,611 thereby converting declared loss of Rs.17,82,913 into assessed income of Rs.24,83,698.*

5.3. *The accounts of India branch office have been duly audited u/s 44AB of the Act. The contention of the appellant that loss during the period under consideration is because of lesser sale and lesser quantum of gross profit appears to be correct. Though GP rate during AY under consideration has been 7.01% as compared to 6.74% as in preceding year, the total gross profit has come down to Rs.68.05 lacs as compared to 102.50 lacs in preceding year because of fall in total sales from 1520.71 lacs to 971.58 lacs. Thus, financial results of the appellant do not show any increase in import price as alleged by the AO. The figures of sale and various expenses have not been doubted by the AO.*

5.4. *Further, TP study report as furnished by the appellant shows average GP margin of 8.80% considering three years data of Compugate Infocom Ltd. It is beyond appellant's control that current year's data of other two*

comparables was not available at time of preparing TP report. This is a genuine hardship faced by the appellant and the issue has been addressed to by Finance Act 2011 vide which due date for filing of return in case of company which is required to furnish a report u/s 92E has been extended to 30th September of the assessment year w.e.f 01.04.2011. The reason behind it is that by the time of due date to file the return of income, data of current year of various companies is not uploaded on public domain. Therefore, non-availability of current year's data at time of preparing TP report can not be viewed in strict sense. The appellant had furnished current year's data of other two comparable companies to the AO at the time of assessment proceedings. However, the AO has not considered it. If current year's data of three comparable companies is considered, then arithmetic mean of gross profit margin comes out to be 6.16%. The appellant has shown GP rate of 7.01% which satisfy arm's length principle test. Therefore, no upward adjustment is called for under facts and circumstances of the case.

5.5. In view of the above discussion, I hold that the transfer price of international transaction as declared by the appellant satisfy arm's length principle test and no upward adjustment is warranted. Therefore, the AO is directed to delete addition of Rs.42,66,611/- The grounds of appeal are accordingly disposed off."

7.1. Accordingly in the absence of any cogent argument assailing the above and being satisfied by the reasoning and finding the departmental ground is dismissed.

8. In the result the appeal of the Revenue is dismissed.

9. In ITA No.-4656/Del/2012, the sole issue agitated by the Revenue pertains to the deletion of penalty imposed u/s 271(1)(c) by the AO amounting to Rs.3,12,890/- on account of the following two additions made in the assessment order which were accepted by the assessee. The additions subject matter of the penalty proceedings are found discussed in the penalty order in para 3 (a) & (b) and are reproduced hereunder for ready-reference:-

- (a) "Assessee had claimed an amount of Rs.5,44,944/- on account of sales-tax demand. However, no sales-tax order or the nature of demand was brought on record. As such, the expense claimed was not allowable for want of evidence. SO this amount of Rs.5,44,944/- was added back to the income of the assessee.*
- (b) Assessee had claimed staff welfare expenses of Rs.79,073/-, communications Rs.3,79,011/-, business promotion Rs.77,796/-. The AO held that as the business exigencies of these expenses were not verifiable, an amount of Rs.2,14,352/- i.e 40% of these expenses which totals to*

Rs.5,35,880/- was disallowed and hence an addition of Rs.2,14,352/- was made.”

10. The explanation of the assessee was not accepted and penalty was imposed. In appeal before the First Appellate Authority the assessee is found to have contended that sales tax demand debited in P&L Account is duly paid and evidence in regard to payments made by cheque was furnished by way of copy of cheques, bank statements etc.

10.1. Addressing the other addition which was subjected to penalty proceeding on account of disallowance of staff welfare communication and business promotion expenses in regard to which adhoc disallowance @ 40% had been made. It was contended that firstly the expenses were incurred for the business purposes of the assessee and secondly the expenses were comparatively lesser when compared to the immediately preceding assessment year.

10.2. Accordingly it was contended that disallowance of a claim of a genuine business expense does not amount to concealment of income nor of furnishing inaccurate particulars and merely because the additions were not challenged it was submitted it does not lead to the conclusion that it amounts to either concealment or of filing inaccurate particulars. Reliance was placed upon the decisions of the Apex Court in the case of Reliance Petro Products Ltd. 189 Taxman 322 and the following decisions:-

- (i) Hindustan Steel Ltd. State of Orissa 83 ITR 26 (SC);
- (ii) Dilip N Shroff vs JCIT (SC);
- (iii) CIT vs Saraf Trading Corporation 167 ITR 909 (Ker.)

10.3. Accepting the explanation the CIT(A) the considering the facts and the legal position arrived at a detailed finding in paras 5.1 to 5.5 so as to hold that the explanation offered is neither false and was infact bonafide. Accordingly the penalty was quashed.

11. Aggrieved by this the Revenue is in appeal before the Tribunal.

12. Ld. CIT DR, Sh. Peeyush Jain relies upon the penalty order. The Ld. AR relies upon the impugned order.

13. We have heard the rival submissions and perused the material available on record. A perusal of the record shows that the CIT(A) on facts qua the first addition has based his finding on the fact the sales tax debited to the P&L Account to the tune of Rs.5,44,944/- was paid vide the following two specific cheques:-

- | | | |
|------|---|--------------------|
| (i) | <i>Ch. No. 050985 dt. 07.02.2007 drawn on HSBC bank issued towards sales tax demand for 2004-05</i> | <i>Rs.5,27,874</i> |
| (ii) | <i>Ch. No.050990 dt. 19.02.2007 drawn on HSBC bank issued towards sales tax demand for 2006-07</i> | <i>Rs.17,070</i> |

13.1. The above finding of the fact has not been assailed by the Revenue. Regarding the other addition made by way of disallowance of 40% of the expenses debited to the P&L Account pertaining to staff welfare; communication expenses and business promotion expenses debited to the P&L account. The following comparative position has been considered:-

	<i>AY 2007-08</i>	<i>AY 2006-07</i>
<i>Staff Welfare</i>	<i>Rs.79,073</i>	<i>1,06,820</i>
<i>Communication expenses</i>	<i>Rs.3,07,656</i>	<i>3,63,531</i>
<i>Business promotion expenses</i>	<i>Rs.77,796</i>	<i>1,97,528</i>

13.2. A perusal of the same shows that the expenses have come down and the disallowance on facts is an adhoc disallowance. The assessee has placed reliance on the decisions relied upon before the CIT(A) including the decision of the Apex Court in Reliance Petro Products Pvt. Ltd. (cited supra). Considering the finding arrived at in the impugned order on the facts as they stand we have no hesitation in holding that the Ld. CIT(A) on facts was fully justified in quashing the penalty order. We are satisfied with the finding that the explanation offered was a bonafide and it most definitely was not a false explanation. Accordingly considering the judicial precedent relied upon for quashing the penalty the reasoning and conclusion is found to be correct on facts. In view of the same, the departmental grounds is dismissed.

14. In the result the appeal of the Revenue is dismissed.

15. In the result the appeals of the Revenue are dismissed.

The order is pronounced in the open court on 28th of November 2014.

**Sd/-
(R.S.SYAL)
ACCOUNTANT MEMBER**

**Sd/-
(DIVA SINGH)
JUDICIAL MEMBER**

Dated: 28/11/2014

Amit Kumar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

**ASSISTANT REGISTRAR
ITAT NEW DELHI**