आयकर अपीलीय अधिकरण, मुंबई "के" खंडपीठ
Income-tax Appellate Tribunal -"K"Bench Mumbai
सर्वश्री राजेन्द्र,लेखा सदस्य एवं सी. एन. प्रसाद,न्यायिक सदस्य
Before S/Sh.Rajendra,Accountant Member and C.N. Prasad,Judicial Member
आयकर अपील सं./I.T.A./7700/Mum/2010,निर्धारण वर्ष /Assessment Year: 2003-04

Income tax Officer-9(2)(1) Room No.225, 2nd Floor, Aayakar Bhavan,M.K. Road, Mumbai-400 020.	Vs.	M/s. Intertoll ICS India Pvt. Ltd. A-Wing, Business Square, 4th Floor, Andheri Kurla Road, Andheri (E), Mumbai- 400 903. **PAN:AAACI 6853 Q**

(अपीलार्थी **/Appellant**) (प्रत्यर्थी / **Respondent)**

Revenue by: Shri Saurabh Deshpande
Assessee by: S/Shri Paras Savla & Harsh Shah
सुनवाई की तारीख / **Date of Hearing: 03.05.2016**
घोषणा की तारीख / **Date of Pronouncement: 25.05.2016**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश
Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order, 6.9.2010 of CIT(A)-15,Mumbai,the Assessing Officer (AO)has filed the present appeal.The assessee,a toll management company filed its return of income on 28.11.2003,declaring loss of Rs.1.62 lakhs.The AO completed the asst on 30.3.06 u/s. 143(3) of the Act,determining the total income at Rs.1.25 crores.

2.First Ground of appeal is about deleting the disallowance of 66.55 lakhs . During the assessment proceedings the AO found that the assessee had paid heavy consultancy charges to M/s.Intertoll Pty.Ltd.,South Africa,that it was an Associated Enterprise(AE)of the assessee.As per the AO,he directed the assessee on various occasions to give the details and nature of consultancy charges paid to its AE and the assessee made very brief submissions stating that it had paid consultancy fee.Vide his letter dated,23.3.2006,he asked the assessee to justify the payment of consultancy charges.He invoked the provisions of section 92C of the Act.As per the AO,the assessee did not make any submission to justify the payment of consultancy charges.He held that the auditors,while endorsing the International Transactions (IT)with the AE,had only relied on the

information provided by the assessee,that the assessee had not submitted any evidence to justify the payment of consultancy fee to its AE.Therefore,he restricted the consultancy charges, payable to the AE to the extent of 75% of the consultancy fees.He determined the Arm's Length Price(ALP)of the IT as under:

	Consultancy fees received(Rs.)	Paid (Rs.)	Allowed(Rs.)	Disallowed(Rs.)
MSRDC 3 Project	32,76,750	34,36,720	8,19,187	26,17,533
Jaypee DSC Project	26,39,226	18,19,554	6,59,806	11,59,748
Ahmedabad Mehsana Project	81,80,220	49,23,077	20,45,055	28,78,022
Total	1,40,96,196	1,01,79,351	35,24,048	66,55,303

As result,disallowance of Rs.66,55,303/- was made u/s. 92C of the Act,holding it to be excessive and unreasonable.

2.1. Aggrieved by the order of the AO the assessee preferred an appeal before the First Appellate Authority (FAA). Before him,it was argued that it had been working with various state governments,state agencies, private BOT companies and NHAIL in a bid to secure consultancy and operational/maintenance contract, that it was positioning itself as one of the early entrants in India in the fields of operation and maintenance,that being a relatively new entrant in the market it did not have necessary expertise,that it took help of an established player in the business of toll road management i.e. its AE, that it had executed three contracts, that the AE was paid at man-hour rate,that the AE had substantially discounted the charges,that the rates charged by the AE was less than the charged to other entities,that it had reported the aforesaid IT in Form 3CEB,that it had demonstrated the Arm's length nature of the transaction, that it had used the Comparable Uncontrolled Price(CUP)method,that it compared the rates charged by the AE to assessee and to an independent entity,that the

assessee had made submission in that regard on 07.02.06,28.02.2006 and 17.03.2006,that it had also replied to the show cause notice dt.23.3.2006 notwithstanding the time constraint on hand, that it was left with only two working days to file the requisite information,that the AO ignored the documents filed by it, that while disallowing the payment the he did not rely on any of the prescribed transfer pricing method(TPM) as required by the Act, that he acted on an ad hoc basis.

During the appellate proceedings the assessee filed additional evidence and additional grounds before the FAA who forwarded the documents to AO and called for a remand report.After considering the available material,the FAA held that the assessee had identified the service agreement entered into by the AE with MIT, Hungary, that it had compared the hourly rate charged by the AE to the assessee with those of the Hungarian party,that the assessee had demonstrated that the scope of service contained in the agreement with the assessee was wide and encompassed the entire spectrum of management and consulting services as against only support services contained in the agreement with MIT-Hungary,that as per the agreement the AE was also required to provide additional services to the assessee, that the AO had rejected the CUP analysis carried out by it without providing any cogent reason, hat the AO was duty bound to rebut the method adopted by the assessee before replacing his own analysis, that AO was mandatorily required to carry out an analysis and to select one of the prescribed methods.

After considering the assessee's submission, remand report and other available material the FAA held that TP proceedings were not whimsical exercise to suit the tax payer/the AO,that the assessee had availed technical services from its AE,that it had selected the CUP method as MAM, that it had identified a service agreement entered into by the AE with MIT Hungary,that it had compared the hourly rates charged by the AE to the assessee with those charged to MIT.The analysis of the scope of the services and the rates charged by AE was as under :

Contracting entities	Intertoll PTY Ltd., S.A. and Intertoll ICS India Pvt. Ltd., India	Intertoll PTY Ltd., S.A. and Magyar Limited, Hungary(MIT)
Project and country where services were provided	Ahmedabad-Mehsana Toll road projest-Gujarat, India.	M5 motorway, Hungary.
Nature of services provided	Consultancy services for toll management	Consultancy services for toll management
Contract period	FY 2002 to FY 2006	FY 2002 to FY 2008
Rate per hour charged	Flat Euro 68/per hour for all level of services	Director-Euro 140/per hour Sr.Manager-Euro 120/per hour; Design engineer –Euro 90/per hour Accountant –Euro 100/per hour **above rates are subject to increase, each year based on inflation index.

He further held that an analysis of the table proves that the scope of services contained in the agreement with the assessee was wide in scope, that the AE was required to provide additional services to the assessee, that the rates charged by the AE were heavily discounted and was less than even the base rate charged by it to the Hungarian-company,that the AO had rejected the analysis carried out by the assessee in a summary manner without assigning any reason, that it was a violation of the guidelines laid down in the decision of Maruti Suzuki and Mosear Baer (316ITR1).The FAA referred to the case of MSS India Pvt. Ltd.(ITA/ 393/ PN/ 2007) and held that it was necessary for the AO to demonstrate that on the given facts of the case a particular method would be more appropriate viz a viz the method adopted by the assessee.The FAA observed that the AO could have corrected his approach while forwarding the remand report and could have adopted any of the 5 methods to determine the ALP, that the AO stuck to the original position and held that 25% of consulting charges should not be allowed,that he had made the disallowance without testing the proposition advanced by the assessee on the touchstone of the prescribed methods,that there was no scope for such arbitrary assumptions. Finally, he held that the CUP method adopted by the assessee was in order and the transaction with its AE was at Arm’s Length.

2.2. Before us, the Departmental Representative(DR) supported the order of the AO and state that TPO had rightly rejected the CUP method, that the basis of the charges recovered from the Hungarian party was not available. The Authorised Representative (AR) stated that the year under consideration was the initial year of operation, that the agreement entered into by the AE with the Hungarian party and with the assessee were made available to the AO, that from the agreements it is clear that the AE was charging lesser consultation fee from the assessee, that there was no reason to reject the CUP method.

2.3. We have heard the rival submissions and perused the material before us.We find that the assessee had entered into agreements with three companies for executing projects namely Ahmedabad-Mehsana Highway;Mumbai-Pune Expressway and Delhi Gurgaon Expressway,that it had made payment to its AE for providing it consultancy,that it had selected CUP method for determining the ALP of the IT, that the AO had directed the assessee to justify the basis of determination of the ALP, that it furnished an agreement entered in to between its AE and an independent Hugarian entity,that the agreement clearly proved that the rates charged by the AE were much less than the rates charged from the independent party,that the scope of the agreement entered in to with the assessee was wider as compared to the agreement of the MIT-Hungary,that without assigning any reason he disallowed 25% of the consultancy charges,that the AO had forwarded him additional evidences for his comments as he had alleged that the assessee had not produced any documentary evidences during assessment proceedings,that the AO did not offer any comments about the additional evidences and justified the disallowance,that the FAA deleted the disallowance holding it to be arbitrary.

First of all we would like to mention that Transfer Pricing(TP)is a systematic, logical and step by step approach,that it envisages an in-depth analysis commencing with screening of data for choice of comparables through

statistical tools and application of the Most Appropriate Method (MAM),that the provisions of Chapter-X of the Act require that a certain discipline is maintained by the assessee as well as the AO while computing the ALP of an IT,that for determining the ALP of a transaction particular method should be followed so that assesses cannot reduce their tax liability while entering in to transactions with their AEs.In the matter of Maruti Suzuki India Ltd.(328 ITR 210)the Hon'ble Delhi High Court has held as under:

> *"The paramount objective behind enactment of these provisions is that the entities which are connected to each other on account of shareholding or managerial control, etc., and thereby are in a position to influence the business decisions of Indian entities, including the payments made to or received by them from the non-resident entity, are not able to shift payment of taxes from India to other countries, by shifting the income which genuinely belongs to the Indian entity, to the non-resident entity, which is not taxed in India. The arm's length principle of transfer pricing is based on the premise that the amount charged by one related party to another for a product must be the same as if the parties were not related."*

Elaborate procedure has been laid down in the Act and in the Income tax Rules, 1962(Rules),the AO is empowered to question the method employed by the assessee or the comparables selected by it,that he can make adjustment rejecting the TP study conducted by the assessee.But,his rights are not unbridled.It is said that rights and duties are two sides of the same coin.In other words,rights demand that a person using his rights should also observe his duties.In taxation matters discretionary powers have been given to the AO.s.,but they are expected to use the power in a fair and just manner. State as an institution can levy and collect only due taxes from its subjects. So,the if the AO.s.determine the tax liability in an unfair manner and if the demand is not of the DUE taxes appellate authorities are expected to allow relief to the assessee .It is what the FAA has done in the case before us.He found that the assessee had selected CUP method one of the valid methods.If the AO had some reservations that the method adopted by the assessee was not MAM,he should have give reasons for rejecting it.He had two chances to rebut the claim of the assessee-during the assessment proceedings and during the remand proceedings.He very well knew that the assessee had objected to the ad hoc disallowance and rejection of the CUP

method.But,he stuck to his guns while submitting the remand report and supported the estimated disallowance.His approach goes against the very basis of the TP provisions.Either he was ignorant of the TP provisions or he was adamant to make the disallowance at any cost.But,his action cannot be endorsed.Why was the transaction entered in to by the AE with MIT Hungary could not be a basis for arriving at ALP was never discussed by the AO.The assessee has discharged his burden of proof.After that onus had shifted to the assessee and in our opinion he has failed miserably to prove that his action of making disallowance was supported by any logical argument or scientific basis.Whims and fancies of an AO cannot decide tax liability of an assessee.We find that the AO has mentioned that the payment made to the AE was excess and unreasonable.But , not a single word has been uttered in the order as to how it was excess or not reasonable.Any disallowance or addition,whether under chapter IV or chapter X of the Act,cannot be made on ad hoc basis.It has to be backed up by a valid and plausible reason.In the TP matters the rule had to be strictly followed as the Act has provided a special mechanism to deal with determination of ALP of IT.s. In our opinion,the order of the FAA does not suffer from any legal or factual infirmity.So,confirming his order,we decide first effective ground against the AO.

3.Next effective ground (GOA-3) is about deleting the disallowance of Rs.4 lakhs.During the asst proceedings,the AO found that the assessee had shown business promotion expenses(BPE)of Rs.7,70,780/-,that the payment for expensive gifts of jewellery and watches were made to a sister concern. Vide his letter dtd. 14.12.2005,he asked the assessee to file details of BPE and its admissibility in view of provisions of Sec.37 of the Act.In its reply the assessee filed details of nature of expenses and the amounts paid.As per the AO the assessee had not given any submission justifying the expenses.He issued a letter on 23.03.2006 to the assessee asking it to justify the BPE.As per the AO on the

date of hearing there was no compliance on behalf of the assessee .Therefore,'in absence of details'he disallowed an amount of Rs.5lacs on estimated basis out of total expenditure of Rs.7.70 lakhs holding that the expenses were not incurred of the purpose of business.

3.1. During the appellate proceedings before the FAA,the assessee argued that it had filed full details of the expenditure incurred during the year under consideration, that there was no allegation that excessive payment was made to sister concern, that it was not the prerogative of the AO to tell the assessee as how to run his business, that during the remand proceedings the AO had not carried out any fresh enquiry.

After considering the submission of the assessee and the remand report,the FAA held that the AO had issued a notice dt.23.3.2006 directing the assessee to appear on 27.3.2006 and produce additional information, that the assessee asked for some time, that the AO rejected the request made by it,that sufficient opportunity was not given to the assessee,that the AO failed to avail the opportunity granted by the-then- FAA and did not add anything new in his remand report,that the payment for expenditure on business promotion including that to the sister concern was by cheque,that there was no finding of fact that the gifts were either not bought or not given,that the AO cannot step into the shoe of the businessman to decide what expenditure to incur, that the accounts of the assessee were audited u/s. 44AB of the Act,that the disallowance of Rs.5 lakhs out of total expenditure of Rs.7.70 lakhs was by any standard excessive.The FAA restricted the disallowance to Rs.1lakh.

3.2. Before us, the DR and the AR supported the order of the AO and the FAA respectively.

We have considered the material on record and heard the rival submissions. We find that the AO had disallowed an amount of Rs. 5 lakhs on an ad hoc basis

without assigning any reason.In our opinion the basic approach of the AO is fautly.During the remand report when all the material was available to him he should have conducted fresh inquries to justify the disallowance.Documentary evidence cannot be brushed aside without dealing them logically.In our opinion the FAA has rightly held that the AO.s. are not authorised to enter in to the proverbial shoes of the assessee.In the case before us,the AO had exactly done it.He has not doubted the genuineness of the payment.If the payment was as per the provisions of the Act then irrespective of the figure involved same had to be allowed.We are of the opinion that no interference is required to disturb the order of the FAA.Confirming his order we decide ground no.3 against the AO.

4.Fourth Ground of appeal is about deleting the disallowance of Rs.1 lakhs under the head travelling and conveyance expenses.During the assessment proceedings,the AO found that the assessee had claimed an amt of Rs.4.83 lakhs as travelling expenses vide his letter dt.23.3.2006, the AO has asked the assessee to justify the expenses incurred on account of infrastructure charges, travelling and conveyance.As per the AO the assessee did not file any detail in that regard.He disallowed an amt of Rs.1.00 lakhs on an estimate basis holding that the assessee had not proved that the expenses were incurred for the purpose of business.

4.1.Before the FAA the assessee submitted that the details of travelling expenditure were filed before the AO on 29.3.2006, that AO has not considered the reply filed by it, that there was no personal element in the expenses incurred for travelling.The FAA held that the AO had made an ad-hoc disallowance without any basis.He deleted the addition made by the AO.

4.2. The DR left the issue to the discretion of the Bench and the AR supported the order of the FAA.

We are of the opinion that the AO had made the ad hoc disallowance without any basis.The assessee had filed necessary details.Secondly,in the case of a

corporate entity no disallowance should be made citing personal element of expenditure .So,endorsing the order of the FAA we dismiss fourth ground.

5.Next ground of appeal is about deleting the disallowance of Rs.75,000/-.While completing the assessment,the AO held that the assessee had claimed telephone expenses of Rs.1.16lakhs for the month of March 2006 out of the total expenditure of Rs.3.80 lakhs.Vide his letter dt.23.3.2006,he asked the assessee to justify the expenditure and to explain the reasons for incurring heavy expenses in the month of March. As per the AO the assessee did not file any explanation. Therefore he disallowed an amount of Rs.75,000/- out of the total expenditure.

5.1. Before the FAA,the assessee submitted that the nature of business warranted continuous use of mobile, that there cannot be any personal use of mobile in the case of a company.After considing facts of the case the FAA deleted the addition.

5.2. The DR stated that the issue could be decided on merits.AR relied upon the order of the FAA.In our opinion,the order of the FAA does not suffer from any legal infirmity.The incurring of expenditure is not doubted.As stated in earlier part our order-it is a case of a company,so,no disallowance can be made on account of personal element of expenditure.We uphold the order of the FAA and dismiss ground no.6.

6.Last Ground of appeal is about deleting the addition of Rs.77.49 lakhs,being PCE mobilisation advance. During the assessment proceedings the AO found that L&T Ltd. had awarded operation and maintenance contract for Ahmedabad- Mehsana Toll to a joint venture company, namely Intertoll ICS(Ahmedabad Mehsana), Toll Management Company Ltd, that the JV had

sub contracted the monbilization related scope of services to the assessee , that during the AY 02-03 the assessee had received Rs.50.00 lakhs by way of mobilization advance, that it was shown as advance in the book of advance, it was carried forward as a liability, that during the year under consideration assessee further received Rs.1.09 crores, that out of the aggregate amount of Rs.1.59 croes (50 lakhs +1.09 cr.), the assessee recognized a sum of Rs.81.80 lakhs as income attributable to the year under appeal, that it carried forward the balance amount i.e. Rs.77.49 lakhs as advance. The AO treated the entire amount of Rs.1.59 crores as income of the assessee for the year under consideration and made an addition of Rs.77.49 lakhs.

6.1 Aggrieved by the order of the AO the assessee preferred an appeal before the FAA. Before him, it was submitted that the assessee had received the mobilization advance only against a valid bank guarantee which continued to subsist throughout the year, that the quantum was recognized on sound basis, that it was supported by sufficient details of work completed, that under the terms of contract the mobilization advance could be appropriated only upon receipt of a completion certificate from the appointed engineer, that because of dispute the amount was not received during the year, even then the assessee had offered income of Rs.81.80 lakhs under the head mobilization charges.

6.2 After considering the submission of the assessee the FAA perused the contract and called for remand report from the AO.He held that in the remand report the AO had himself produced certain clauses of the agreement, that the agreement supported the claim made by the assessee , that the assessee was not the unquestioned owner of the money received as advance, that it was a pure mobilization advance, that the figure of Rs.81.80 lakhs consisted of three components, project start-up(Rs.36.97lakhs); recruitment (Rs.5.49lakhs) and system designing, interim management meetings etc. (Rs.39.33 lakhs). He

further observed that the AO had not given proper opportunity to the assessee at the time of assessment stage, that he did not examine the documents during the remand proceedings, that the recognition of Rs.81.80 lakhs was on sound basis, that there was nothing on record to suggest that revenue had not been properly recognized. Finally, he deleted the addition made by the AO.

6.3 Before us the DR supported the order of the AO. The AR relied upon the order of the FAA and stated that all the income from mobilisation charges were offered in the AY 05-06.

After considering the rival submissions we are of the opinion that the order of the FAA does not suffer from any legal infirmity, that the amount in question was received as advance, that the assessee had recognized a portion of the said amount during the year under appeal, that the recognition was based on scientific method, that the assessee had taken into consideration factors like start-up,recruitment etc., that the AO had disallowed the amount without considering the terms and conditions of the agreement. Therefore, confirming the order of the FAA, we decide the last ground against the AO.

As a result, appeal filed by the AO stands dismissed.
फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 25th May, 2016.
आदेश की घोषणा खुले न्यायालय में दिनाक 25 मई, 2016 को की गई ।

Sd/-	**Sd/-**
(सी. एन. प्रसाद **/ C.N. Prasad**)	(राजेन्द्र **/ Rajendra**)
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांकDated : 25.05.2016.
Jv.Sr.PS.

आदेश की प्रतिलिपि ग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR "K " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**