Tenet Tax & Legal Private Limited

Tenet Tax Daily
April 28, 2014

ITAT stayed recovery of tax as assessee had made a strong case against TP adjustment.

Summary – The Delhi ITAT in a recent case of Mitsubishi Corporation India (P.) Ltd., (the Assessee) held that stay on recovery of demand be granted as assessee had made out a prima facie case that T.P. adjustment so made was not warranted.

ORDER

By means of the present stay application, the assessee requires the Tribunal to stay demand of Rs. 621,18,79,951/- inclusive of interest for the A.Y. 2009-10 till the disposal of the captioned appeal by the Tribunal.

After having heard both the sides and perused the relevant material on record, the ITAT observed that this demand of Rs. 621.18 crores has three components viz., Rs.6.69 crore arising on account of TP addition; Rs.614.47 crore arising out of disallowance u/s 40(a)(i); Rs.1.25 lakh arising out of disallowance u/s 14A.

We are taking up the first component, being the demand of 6.69 crores arising out of the TP addition. Our attention has been drawn towards the order passed by the TPO, who, while computing the ALP of the commission income earned by the assessee, clubbed cost of goods sold of the associated enterprise whose goods were sold by the assessee on commission basis along with the expenses incurred by the assessee. It was demonstrated by inviting our attention towards page 30 of the TPO's order on which he computed the TP adjustment at Rs.12.46 crores by including the cost base of the AE at Rs. 564 crores with that of the assessee at around Rs.15 crores. It was shown that the Dispute Resolution Panel (DRP) upheld the TPO's action by relying on the Tribunal order passed in the case of *Li & Fung (India) (P.) Ltd.* v. *Dy. CIT* [2011] 16 Taxmann.com 192 (Delhi). The ld. AR submitted that the said order passed by the Tribunal has been reversed by the Hon'ble jurisdictional High Court. Our attention was drawn towards a copy of this judgment placed on page 190 of the paper book. In these circumstances, it was urged that there remained no basis for addition and consequently full stay be granted on this count. The ld. Departmental Representative was fair enough to accept the position stated on behalf of the assessee.

Considering the totality of facts and circumstances of the case specially the judgment of the Hon'ble jurisdictional High Court in the case of *Li & Fung India (P.) Ltd.* (*supra*), we find that the assessee has made out a prima-facie case that the TP addition so made is unwarranted. We refrain from discussing in detail the merits of deletion or otherwise of the addition at this juncture.

Second component of demand is Rs.614.47 crores which arose out of disallowance made u/s 40(a)(i) of the Act. The ld. AR submitted that the basis for making this disallowance u/s 40(a)(i) is found in the similar disallowance made by the Assessing Officer for the assessment year 2006-07. While placing on record a copy of the order passed by the Tribunal for such earlier year, the ld. AR submitted that the Tribunal was pleased to delete this disallowance.

The ld. DR vehemently argued that the correct position of law did not appear to have been properly placed before the Bench at the time of haring of the appeal for the assessment year 2006-07. Referring to amendment carried out to sec. 40(a)(i) by way of substitution of clauses (i), (ia) and (ib) for sub-clause (i) of section 40(a) w.e.f. 1.4.2005, it was stated that the so-called non-discrimination between the resident and non-resident has been dispensed with w.e.f. the assessment year 2005-06. He stated that such amended position ought to have been placed before the Bench during the course of hearing for the assessment year 2006-07. Regarding the other point considered by the Tribunal for the earlier year in deleting the disallowance u/s 40(a)(i), the ld. DR stated that the amounts were admitted chargeable to tax in the hands of recipients for the current year.

In so far as the question of grant of stay is concerned, we feel that the assessee needs to prove a prima-facie case in its favour. If the assessee succeeds in proving such a case, then the question of granting stay on appropriate conditions can be considered. As regards the prima-facie of the present issue is concerned, we find that there is a direct decision given by the Tribunal in assessee's own case for the assessment year 2006-07 deleting similar disallowance u/s 40(a)(i). The amendment to sec. 40(a)(i), brought to our notice by the ld. DR, became effective from the assessment year 2005-06 and as such was impliedly not absent for consideration from the tribunal at the time of deciding this issue in favour of the assessee for the assessment year 2006-07. The Hon'ble Delhi High Court in *Maruti Suzuki India (P.) Ltd*. v. *Dy. CIT* [2012] 347 ITR 43/204 Taxman 48/16 taxmann.com 40 has held that the decisions of the CIT(A) or the Tribunal in favour of the assessee should not be ignored while considering the question of grant of stay. Respectfully following the judgment of the Hon'ble High Court and the fact that the Tribunal for the assessment year 2006-07 has deleted such disallowance made by the A.O. u/s 40(a)(i), we are of the considered opinion that, at least prima-facie, the assessee has made out a case for stay of demand on this issue. We order accordingly, and hold that no recovery can be effected against the demand arising from such disallowance.

The last component of the demand is a meager sum of Rs.1.25 lac which resulted out of disallowance of Rs.2.33 lac made by the A.O. u/s 14A of the Act. Considering the facts in totality and the smallness of the demand on this issue, we are of the considered opinion that the assessee deserves a full stay on its demand of Rs. 621.18 crores. We order accordingly. However, the assessee is directed to furnish an undertaking to the satisfaction of the A.O. that it shall not alienate any of its immovable assets till the disposal of the appeal.

It has been brought we notice that the early hearing of this appeal already stands granted for 17.4.2014. The ld. DR requested that the date of early hearing may be proponed as the Revenue is quite hopeful of of its victory in the present case before the Tribunal. The ld. AR did not raise any objection if the appeal was taken up for hearing on mutually acceptable date of 18.3.2014. Under these circumstances, we direct the registry to fix this appeal for hearing on 18.3.2014.

It is made clear that the assessee will not be entitled to seek any adjournment on the said date without a just cause. In case any of the aforenoted conditions is/are violated, the stay will vacate and the case shall be de-listed from the priority list to be taken upon for hearing in due course.

In the result, the stay application is allowed in above terms.