IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : I-1 : NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.354/Del/2017
Assessment Year 2012-13

ITA No.1653/Del/2016
Assessment Year: 2011-12

AT & T Communication Services (India) P. Ltd., Vatika Triangle, 3rd Floor, Sushant Lok-1, Block-A, Gurgaon.	Vs.	DCIT, Circle-3(2), New Delhi.

PAN: AACCA8033E

(Appellant)		(Respondent)
Assessee by	:	Shri Kanchun Kaushal, AR & Ms Chinu Bhasin, CA
Revenue by	:	Shri Sanjay I Bara, CIT, DR
Date of Hearing	:	25.10.2018
Date of Pronouncement	:	31.10.2018

ORDER

PER N.K. BILLAIYA, AM:

These are separate appeals by the assessee preferred against two separate assessment orders dated 20.12.2016 and 29.01.2016 framed u/s 143(3) r.w. section 144C(13) of the Act pertaining to assessment years 2012-13 and 2011-12,

respectively. Both these appeals were heard together and are disposed of by this common order for the sake of convenience and brevity.

2. Representatives of both the sides agreed that assessment year 2012-13 may be considered as the lead assessment year for the sake of disposal of the appeals. On such concession, we have considered the facts for assessment year 2012-13.

3. The appellant company is a wholly owned subsidiary of AT & T Communication Services International Inc., USA which started its commercial operations during assessment year 2007-08 and its business operations can be divided into the following three broad categories:-

i) Provision of market research, administrative support and liaison services;

ii) Provision of network outsourcing services - solutions business; and

iii) Provision of network support services - network monitoring and support.

4. During the relevant assessment year, the appellant undertook the following international transactions with its associated enterprises (AEs):-

Sr. No.	Particulars of transaction	Amount (in Rs Cr)	Result
1	Provision of market research, administrative support and liaison services ('MRA')	91.29	Considered to be at Arm's Length by TPO
2.	Provision of Network Support Services ('NSS')	24.55	Considered to be at Arm's Length by TPO
3.	Reimbursement of expenses to AEs	4.17	Considered to be at Arm's Length by TPO

5. As can be seen from the chart, the aforementioned international transactions were held to be at arm's length. However, the TPO was of the firm belief that the

outstanding receivables from associated enterprises are loan and, accordingly, proceeded by imputing notional interest on the same. The TPO re-characterised the outstanding receivables from AEs as a loan and made an upward adjustment of Rs.7.84 crore. The TPO used the average SBI base rate of the relevant year + 300 basis points and arrived at an interest rate of 12.60%.

6. When the proposed upward adjustment was objected before the DRP, the DRP, after considering the facts and the submissions, reduced the addition to Rs.2,85,19,002/-.

7. Before us, the ld. counsel for the assessee vehemently stated that as a matter of policy, the appellant does not charge any interest from third party customers on outstanding receivables. Therefore, following the same policy, no interest should be charged on outstanding receivables from the AEs. *Per contra*, the DR, supporting the findings of the lower authorities, stated that no such agreement has been placed on record by the assessee. It is the say of the DR that volume of transaction with non-AEs is miniscule to the volume of transaction with the AEs. Therefore, the DRP has rightly upheld the adjustment of Rs.2,85,19,002/-.

8. We have given a thoughtful consideration to the orders of the authorities below. In our considered view, the outstanding receivables from AEs do not tantamount to an international transaction which requires to be benchmarked separately as the transaction is already embedded in the international transaction pertaining to

'Provision of network support services.' We find that the assessee has duly benchmarked the receivables arriving from the international transaction undertaken by it by treating it as closely linked to the main transaction and, accordingly, the impact of the credit period extended on the arm's length price (ALP) was considered while determining the ALP of the international transaction. Moreover, we are of the opinion that early or late realization of sale/service proceeds is incidental to the transaction of sale/service and is not a separate transaction in itself. Once ALP is determined in respect of the sale/service transaction, it would be deemed to be covering all the elements and consequences of the sale/service.

9. We further find that the assessee has not charged any interest from non-AEs even where the same is due for a period of approximately 119 days to over 1700 days and the average credit period extended to unrelated party customers works out to be 955 days.

10. It is pertinent to mention here that a similar adjustment was made in assessment year 2009-10 and the DRP deleted the same by observing that the interest foregone by the assessee on outstanding receivables from non-AEs is higher than the interest foregone from AEs.

11. For the sake of completeness of the adjudication, we find that the working capital adjustment subsumed in main international transaction has been accepted by the TPO inasmuch as working capital adjusted in operating margin of the comparable

companies was taken by the TPO at 6.38% whereas appellant's margin was 16.78% in respect of 'Provision of network support services.' The appellant's margin is 16.60% whereas arm's length margin accepted by the TPO was 7.01%. Once the working capital adjustment has been accepted, then, we do not find any merit in making further adjustment in respect of outstanding receivables. Our view is further fortified by the decision of the Hon'ble jurisdictional High Court of Delhi in the case of *Kusum Healthcare Pvt. Ltd., in ITA No.765/2016*. The relevant extract is reproduced below:-

> "11. The Court finds that the entire focus of the AO was on just one AY and the figure of receivables in relation to that AY can hardly reflect a pattern that would justify a TPO concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself. With the Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-a-vis that of its comparables, any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterised the transaction. This was clearly impermissible in law as explained by this Court in CIT v. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi)."

12. Considering the facts of the case in hand in totality in the light of the above, we do not find any merit in the adjustment made by the Assessing Officer. We, accordingly, direct the Assessing Officer to delete the addition of Rs.2,85,19,002/-. Ground No.1 with all its sub-grounds is allowed.

13. Ground No.2 relates to the disallowance on account of statutory liabilities payable.

14. During the course of scrutiny assessment proceedings, the Assessing Officer asked the assessee to justify as to why additions/disallowances made in earlier years

should not be made in this year, again. The assessee explained that during the relevant assessment year, an amount of Rs.1,34,62,243/- was booked under the head 'Other current liabilities' in the balance sheet. The Assessing Officer found that the proof of payment/reversal for Rs.76,01,691/- were not examined and it was found that service tax payments of Rs.6,90,777/- were made after the due date of filing of return. On verification of the evidences submitted by the assessee, the Assessing Officer allowed Rs.76,01,691/- out of Rs.1,34,62,243/- and made an addition of Rs.58,60,552/- u/s 43B of the Act which was confirmed by the DRP.

15. Before us, the counsel explained that the assessee is maintaining its books of account on accrual basis and further explained the accounting entries posted in the books of account in respect of output service tax and now service tax. It is the say of the counsel that the output service tax payable which is collected from and on behalf of customers to be deposited to the government account is shown as current liability in the balance sheet. Similarly, the input service tax credit which is levied by the vendors is recorded as a current asset under the head 'Loans and advances.' The counsel vehemently stated that neither of the two is charged to Profit & Loss Account. Therefore, there is no question of any disallowance u/s 43B of the Act. It is the say of the counsel that entries have not been properly appreciated by the Assessing Officer and, therefore, the Assessing Officer may be directed to verify the entries and decide the issue afresh. *Per contra*, the ld. DR could not add anything to what the Assessing Officer has done.

16. We have carefully considered the orders of the authorities below qua the issue. It appears that the Assessing Officer has not properly appreciated the accounting entries in their due perspective. The marginal heading of section 43B clearly states that certain deductions to be allowed on actual payment. This means that if the assessee has claimed deductions, the same can be disallowed u/s 43B of the Act. However, in the case in hand, the assessee has not claimed any deduction as the input service tax and the output service tax have never been routed through the P&L Account. However, in the interest of justice and fair play, we restore this issue to the files of the Assessing Officer. The assessee is directed to explain the entries and the Assessing Officer is directed to verify the same and decide the issue as per the provisions of the law. Ground No.2 is treated as allowed for statistical purposes.

17. Ground No.3 relates to the disallowance of year end accruals amounting to Rs.1.58 crore. The details of year end accruals outstanding as on 31.03.2012 are as follows:-

(i) Accrual control account - Rs.8,19,18,087/-

(ii) SIP Agreement - Rs.55,73,350/-

18. Out of the above accrual, invoices aggregating to Rs.2.92 crore were submitted by the assessee before the Assessing Officer and, further, reversal entries of Rs.4.23 crore were shown as reversed in the succeeding assessment year. The Assessing Officer, accordingly, granted the benefit of Rs.7.16 crore, but, disallowed Rs.1.58 crore. The main reason given by the Assessing Officer for disallowing Rs.1.58 crore

is that the assessee did not have invoices for the same and there is no basis of recording the year end accrual and the assessee has not been able to substantiate utilization/reversal of such accruals in subsequent years also.

19. Before us, the counsel stated that since the assessee follows mercantile system of accounting, therefore, in order to arrive at the correct profit for any given year, it is required to account for all expenses pertaining to the year in accordance with the matching principle. It is the say of the counsel that the invoices relatable to the year-end accruals were received/paid by the assessee in the subsequent years, the year-end accruals are reversed and the actual expenses are charged and debited to the P&L Account. The counsel requested for the allowance of the expenses in the year of creation itself. The AR strongly supported the findings of the Assessing Officer.

20. After considering the underlying facts in the issue, we find that the coordinate bench in the assessee's own case in assessment year 2010-11 has decided this issue in favour of the assessee. The coordinate Bench in ITA No.1016/Del/2015 has held as under:-

> "25. When undisputedly no mistake has beenpointed out by the Assessing Officer inthe calculation nor it is the case of the AO that the taxpayer had not paid certain bills and the taxpayer is following mercantile system of accounting and the expenses are having element of estimation as well as scientific basis, keeping in view the past trend, the expenses are required to be allowed in the year of creation itself, particularly, when the Revenue authorities has allowed the entire claim of expenditure in the subsequent years.
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> 26. So, following the law laid down by the Hon'ble Apex Court in Rotork Controls India (P) Ltd. (supra) and the decision rendered by the coordinate Bench of the Tribunal in AGNSI in ITA No.1059/Del/2015 for AY 2010-11, we are of the considered view that when the taxpayer has worked out the liability by using a substantial degree of estimation by proving 95% of the invoices on the basis of

historical trend, no disallowance can be made. So, we order to delete this addition."

21. Respectfully following the findings of the coordinate Bench, we order for the deletion of the said addition. Ground No.3 is allowed.

22. Ground No.4 relates to the addition on account of non-charging of mark-up on support service charges billed to AGNSI amounting to Rs.1.99 crore. During the course of scrutiny assessment proceedings, the assessee was asked to justify as to why additions made in the last year should not be made in this year also. The said query related to the transactions between a group company AGNSI and the ssessee. AGNSI commenced its business operations from assessment year 2008-09 onwards and did not have its own support service functions such as tax, legal, finance, HR, etc. Accordingly, AGNSI entered into an operational support service agreement with the assessee for provision of such support services to AGNSI. As per this agreement, no mark-up was required to be charged on the support service charges paid by AGNSI to the assessee. The Assessing Officer was of the firm belief that no prudent business will provide services to the other entity without profit motive. Accordingly, the Assessing Officer made an addition of Rs.1.84 crore on account of non-charging of mark-up on support services. The addition was confirmed by the DRP.

23. Before us, the counsel for the assessee stated that the costs incurred by the assessee for provision of such services to AGNSI are charged. However, no mark up is applicable and required to be charged on the support service charges paid by

AGNSI. It is the say of the counsel that there is no provision under the Act to impute notional income for domestic transactions. The counsel further stated that the provisions of the Act do not stipulate charging of any mark up in relation to expenses cross charged between two domestic entities. The DR strongly supported the findings of the Assessing Officer.

24. We have carefully considered the orders of the authorities below. The Assessing Officer has proceeded by referring to the additions made in last year. We find that in earlier year, the coordinate Bench in ITA No.1016/Del/2015, assessment year 2010-11, has deleted the similar additions. The relevant findings of the coordinate Bench read:-

> "16. So, in the instant case also, the Revenue has failed to controvert the invoices, me details of payment made and evidencing the payments thereof to dispute the genuineness of the expenses and the fact that the taxpayer as well as AGNSI are profit making entities and there was no tax incentives for the purpose to deflate the revenues earned by the taxpayer, the Revenue has based its decision on commercial consideration. Moreover, in case of both the resident parties, terms and conditions of the arrangement cannot be questioned by the Revenue unless specifically provided under the Act. In case of a contract by both the parties who are admittedly resident Indian entities, they make the law for themselves which cannot be interfered unless contract is unlawful or specially barred by the law of the land. Moreover by such a decision of not charging mark up by the taxpayer on support services charges billed to AGNSI, no loss of tax has been caused to Revenue. So, the findings of the TPO/DRP that the taxpayer is not only to cut charges but mark up also is not sustainable in the eyes of law. So, we order to delete the addition on account of not charging of mark up on support services charges billed to AGNSI."

25. Respectfully following the findings of the coordinate Bench, we direct the Assessing Officer to delete the impugned addition. Ground No.4 is allowed.

Ground No.5 is not pressed and the same is dismissed as not pressed.

26. Ground No.6 relates to the addition on account of non-deduction of tax at source on reimbursement made to AT &T World Personnel Services Inc. (AWPS).

27. The underlying facts in this issue show that the assessee entered into master service agreement with AT&T USA for provision of market research, administrative support and liaison services and other support services. AWPS is a company incorporated in the US and is engaged in provision of manpower recruitment services. During the year under consideration, the assessee required personnel for facilitating its business operations in India. Accordingly, certain employees having different work profiles and job responsibilities were seconded by AWPS to assessee in India. Accordingly, the international assignees were released from all obligations towards AWPS and would function solely under the control, direction and supervision of the assessee. Pursuant to the secondment agreement, the assessee reimbursed a sum of Rs.4,17,56,851/- to AWPS for the salary and other cost paid by AWPS to such expatriates outside India for and on behalf of the assessee.

28. The Assessing Officer was of the firm belief that the assessee ought to have deducted tax at source u/s 40a(i) of the Act and for failure disallowed Rs.4,17,56,851/. The Assessing Officer was of the opinion that the said amount remitted to AWPS constitutes Fees for Included Services (FIS)/Fee for Technical Services (FTS) in terms of Indo-US DTAA as well as u/s 9(1)(vii) of the Act and relied upon the decision of the Hon'ble High Court of Delhi in the case of Centrica India Offshore Pvt. Ltd. vs.

CIT (2014) 364 ITR 336 (Del). The action of the Assessing Officer was confirmed by the DRP.

29. Before us, the counsel for the assessee vehemently stated that provisions of section 192 of the Act are applicable on the impugned transaction and the Assessing Officer has wrongly applied the provisions of section 195 of the Act. It is the say of the counsel that employees were seconded by AWPS to the assessee and the seconded employees were responsible for performing all business functions in their personal capacity effectively as employee of the assessee and were not rendering any services to the assessee for and on behalf of AWPS. It is the say of the counsel that the seconded employees were not working in India to facilitate the business of AWPS, therefore, the payment made to the employees seconded by AWPS can only be classified as salary on which tax has been deducted at source u/s 192 of the Act and section 195 is not at all applicable on the facts of the case. *Per contra*, the DR, supporting the assessment order, stated that no employer-employee relationship has been brought on record between the assessee and the seconded employees and, therefore, provisions of section 195 are applicable and not section 192. The DR requested for upholding the findings of the Assessing Officer.

30. We have given a thoughtful consideration to the orders of the authorities below. It would be appropriate to reproduce the related statutory provision set out in section 195(1):

> **"**Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest on securities) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force."

31. It can be seen from the above that so long as a payment to non-resident entity is in the nature of payment consisting of income chargeable under the head 'Salaries', the assessee does not have any tax withholding applications u/s 195 of the Act. In our considered view, the nature of income embedded in related payments is relevant for deciding whether or not section 195 will come into play. We have also gone through the agreements exhibited at pages 525-530 of the paper book and have also considered Form 16 which are placed on record on page 605 of the paper book. Considering the facts on record, it can be reasonably concluded that the employees seconded to the assessee company are working as the employees of the assessee company, their salary is subject to TDS u/s 192 of the Act and, therefore, provisions of section 195 are not applicable on the facts of the case in hand.

32. In our considered view, the reliance on the decision of the Hon'ble High Court of Delhi in the case of Centrica (supra) by the Assessing Officer is misplaced inasmuch as the seconded employees of AWPS were not taking forward the business of AWPS in India, but, were effectively working under the control and supervision of the assessee company and by no means can be said to be rendering services on behalf of AWPS. Whereas in the case of Centrica (supra), it was established only to provide

services to the overseas entity to ensure that the services to be rendered to the overseas entities by the Indian vendor are properly coordinated. We are, therefore, of the considered view that reimbursement made by the appellant company cannot be classified as FTS/FIS under the provisions of the Act and Indo-US DTAA. It would not be out of place to mention here that total tax deducted by the assessee u/s 192 of the Act is Rs.1,97,36,176/- which is much higher than the withholding tax sought to be levied by the Assessing Officer which comes to 10% of Rs.4,17,56,851/-. Considering the facts in totality, we direct the Assessing Officer to delete the impugned addition. Ground No.6 is allowed.

33. In the result, the appeal filed by the assessee is allowed in part for statistical purposes.

ITA No.1653/Del/2016 (A.Y. 2011-12)

34. Ground No.1 relates to the addition on account of mark up not charged on support services.

35. An identical issue was considered by us in ITA No.354/Del/2017 (supra) vide ground No.4 of the appeal. For our detailed discussion therein, this ground is allowed. Ground No.2 relates to the addition on account of year-end accruals. A similar issue was considered by us in ITA No.354 (supra) vide ground No.3 of the appeal. For our detailed discussion therein this ground is allowed.

36. Ground No.3 relates to the disallowance on account of statutory liabilities. A similar issue has been considered by us in ITA 354 (supra) vide ground No.2 of the appeal wherein we have restored the issue with certain directions to the files of the Assessing Officer. For similar reasons, we restore this issue to the files of the Assessing Officer to be decided accordingly. This ground is allowed for statistical purposes.

37. Ground No.4 relates to the transfer pricing adjustment of Rs.1,10,99,474/-.

38. Before us, the counsel stated that this addition has been deleted by the Assessing Officer vide order dated 08.08.2016 framed u/s 154 of the Act. Since the addition has been deleted by the Assessing Officer, this ground becomes infructuous.

39. In the result, ITA No.1653/Del/2016 is allowed in part for statistical purposes.

The decision was pronounced in the open court on 31.10.2018.

Sd/-	Sd/-
(SUCHITRA KAMBLE) JUDICIAL MEMBER	(N.K. BILLAIYA) ACCOUNTANT MEMFBER

Dated: 31st October, 2018

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Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi