

**IN THE INCOME TAX APPELLATE TRIBUNAL  
HYDERABAD BENCHES "A" : HYDERABAD  
(THROUGH VIDEO CONFERENCE)**

**BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER  
AND  
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No.	A.Y.	Appellant	Respondent
329/Hyd/16	2011-12	M/s.GSS Infotech Limited <i>(Formerly known as GSS America Infotech Limited)</i> Hyderabad	Asst.Commissioner of Income Tax, Circle-2(2), Hyderabad
602/Hyd/17	2012-13	[PAN: AADCM6759Q]	Deputy Commissioner of Income Tax, Circle-2(2), Hyderabad

For Assessee : Shri P.Murali Mohana Rao, AR  
For Revenue : Smt. Anjala Sahu, DR

Date of Hearing : 25-03-2021  
Date of Pronouncement : 07-05-2021

**ORDER**

**PER S.S.GODARA, J.M. :**

These two assessee's appeals for AYs.2011-12 & 2012-13 arise from the ACIT, Circle-2(2) and DCIT, Circle-2(2), Hyderabad's assessments dated 28-01-2016 and 30-01-2017 in furtherance to the Dispute Resolution Panel (DRP)-1, Bengaluru's directions dt.28-12-2015 and 30-11-2016 in F.No.421/DRP-BNG/2015-16 & 180/DRP-1/BNG/2016-17 involving proceedings u/s.143(3) r.w.s.92CA(4) r.w.s.144C(13) and 143(3) r.w.s.92CA(4) of the Income Tax Act, 1961 [in short, 'the Act']; respectively.

Heard both the parties. Case files perused.

2. It emerges at the outset that with the able assistance of both learned representatives that this tribunal's earlier co-ordinate bench's common order dt.30-11-2017 had partly accepted the instant twin appeals for statistical purposes. The assessee then filed its miscellaneous applications 62 and 63/Hyd/2018 u/s.254(2) in both the assessment years. Learned co-ordinate bench's yet another common order dt.14-09-2018 accepted the same as follows:

*"These Miscellaneous Applications are filed by the assessee seeking recall of the consolidated order of the Tribunal dated 27/09/2017 in ITA Nos. 267/Hyd/2014, 329/Hyd/2016 and 602/Hyd/2017.*

*2. In the M.A. 62/H/18, assessee pointed out that the ground Nos. 7 & 8 relating to onsite consultancy through branches of Rs. 25,28,81,520/- and ground Nos. 9 & 10 relating to adjustment of interest on receivables for Rs. 1,42,66,859/- were not adjudicated by the Tribunal by observing as under:*

***"The grounds Nos. 7 to 10 are alternative grounds to the above grounds, therefore, the same is not required to be adjudicated as the main grounds are adjudicated in favour of the assessee."***

*2.1 Further, the assessee pointed out that the company has not charged interest irrespective of whether the amount is receivable from AE or Non AE which is identical to AY 2012-13 and which is also submitted before the Tribunal vide ground Nos. 9 & 10, 10(a) to 10(g).*

*2.2 In view of the above, the assessee stated that the grounds which are independent to the main grounds, has to be considered separately.*

*2.3 In M.A. 63/H/18, assessee stated that while disposing of ground No. 7, 7a to 7k relating to ALP adjustment of interest on receivables for Rs. 1,04,34,308/-, the Tribunal observed that section 10A allows assessee to bring the foreign exchange in India within 6 months to claim benefit under this section and the same period as reasonable period for outstanding and directed the AO to charge interest of LIBOR + 200 bps on the outstanding amount beyond 6 months.*

*2.3 In this connection, assessee submitted that as per the amendment to the section 155(11A) of the IT Act, the exemption u/s 10A is allowed even if the money is received beyond six months. In this connection, he relied the decision of the ITAT in the case of ValueLabs for AY 2012-13 in ITA No. 475/Hyd/2017.*

3. Referring to the above factual back ground, the ld. AR of the assessee submitted that the earlier order may be recalled and the appeal to be decided on merits.

4. Considered the rival submissions and perused the material on record. As submitted by the assessee, we recall the order (supra) for the limited purpose to adjudicate ground Nos. 7 to 10 in AY 2011-12 and ground Nos. 7, 7a to 7k in AY 2012-13 and other part of the order remains as it is. The registry is directed to post the appeals for hearing and adjudicating the above grounds in due course”.

It is in this backdrop of facts that we proceed to deal with the remaining un-adjudicated issues herein.

3. Coming to former AY.2011-12, we find that the assessee’s 7<sup>th</sup> and 8<sup>th</sup> substantive grounds seek to treat its ‘onsite consultancy through branches’ receipts as part of its export turnover for the reason that the same is also eligible for Section 10A deduction in light of Explanation-III thereto. Suffice to say, this tribunal’s yet another co-ordinate bench’s decision in assessee’s appeal itself ITA No.497/Hyd/2015 for AY.2010-11 decided on 28-03-2018 has accepted the very grievance in principle thereby restoring the same back to the Assessing Officer for his necessary factual verification as under:

*“5.3. The Fourth item in this is ‘on-site consultancy’ through the branches for which assessee relied upon Explanation 3 and sub-section-I of Section 10A which are deemed to be the profits and gains as per the provisions. It was the contention that profits and gains derived from on-site branches also would be considered as deemed profits for the purpose of export of computer software outside India. We were also informed that in spite of clear directions from the DRP, AO did not examine these issues. Ld. Counsel relied on various case law for various propositions are as under:*

a.	Letter from Authorised Dealer with regard to the regularization of Export Proceeds is entitled to exemption u/s. 10A(3) of the Act	Prithvi Information Solutions Ltd Vs. ITO, Ward-2(2), Hyd ITA No. 225/Hyd/2005	Export receivable received after 1 year 2.5 months of Rs. 5,31,09,900/-
b.	When realizations were actually transferred to subsidiary as an investment within the extended time by RBI, it is to be considered for exemption u/s. 10A.	Sankhya InfoTech Ltd., ITA No. 316-320/H/2010	Export receivable converted into equity of Rs. 12,23,68,351/-
c.	Onsite sales should not be excluded from Export Turnover	M/s. Zylog systems Ltd Vs. ITO (2011) 128 ITD 105	Onsite Consultancy of Branches of Rs. 27,72,24,369/-
	Whatever amount has been excluded from the export turnover should also be excluded from the total turnover for the purpose of computation of exemption u/s. 10A of the Act	ITO Vs. D E Block India Software Pvt Ltd., ITA No. 983 and 984/Hyd/2006	
	Branch Sales should be excluded from Export turnover as well as from total turnover	DCIT Vs. Seven Hills Business Solutions P Ltd., Hyderabad ITA No. 82/Hyd/2009	

6. Ld. DR however, relied on the order of the DRP.

7. We have considered the issue. As can be seen from the order of the DRP also, it has more or less accepted assessee's contentions. But while implementing the orders of the DRP, AO did not examine the issues at all. Consequently, we are of the opinion that these issues require examination by the AO in detail and then assessee claim u/s. 10A should be allowed. May be because of lack of time, AO did not implement the directions. Be that as it may, we are convinced that assessee is entitled for various deductions on the basis of the provisions of the Act case law relied and therefore, AO is directed to verify the contentions and allow the same, keeping in mind the provisions of the Act and relevant case law relied upon. AO is directed to examine all the above issues afresh after giving due opportunity to assessee. With these directions, the grounds are considered allowed for statistical purposes".

We also adopt the very reasoning *mutatis mutandis* and direct the Assessing Officer to decide the assessee's instant grievance afresh in the same terms.

We stay back in AY.2011-12 and notice that the assessee's 9<sup>th</sup> and 10<sup>th</sup> substantive grounds seek to reverse both the lower authorities' action making Arm's Length Price (ALP) adjustment of interest of Rs.1,42,66,859/- *qua* delayed receivables on alleged sundry debtors of Rs.17,61,37,767/- and ground No.7 in AY.2012-13 involve similar figure of receivables of Rs.1,04,34,308/-; respectively. It transpires from a perusal of pg.8 in AYs.2011-12 of DRP's directions dt.28-12-2015 and TPO's order to this effect dt.12-11-2014 that the impugned adjustment has been made @5% by way of 'limited relief' and 3.94%; respectively. This is a *prima-facie* case of clear cut enhancement at DRP's level in other words in AY.2011-12.

4. We next notice in AY.2012-13 that the DRP's directions dt.30-11-2016 in pg.12, 2<sup>nd</sup> para also take note of the tribunal's 'set aside' order dt.29-04-2016 in assessee's own case for AY.2010-11 (*supra*) that the Assessing Officer required to recompute the impugned interest on the actual interest cost for the specific number of days only.

5. We have given our thoughtful consideration to rival pleadings against and in support of the impugned adjustment. Both the learned lower representatives took us to the earlier co-ordinate bench's order remitting the very issue back to the AO/TPO as follows:

"Levy of interest of Rs. 47,25,188/- :-

4. During the FY. 2009-10, assessee advanced a sum of Rs. 30,18,54,791/- as interest free funds to its AE, M/s. GSS America Inc, wherein the opening balance as on 01-04-2009 was at Rs. 43,12,68,000/- and outstanding as on 31-03-2010 stood at

Rs. 73,31,22,791/-. The argument of assessee before the TPO was that the funds were given out of free reserves and the amount was in the nature of quasi-equity and the advances converted into equity in FY. 2011-12 and the facts are similar to the decision of the ITAT in the case of Mascan Global Limited in ITA No. 2205/10 dt. 12-08-2011. The TPO however, did not accept and determined the interest at 4.06% pa and worked out the levy of interest of Rs. 47,25,188/-.

4.1. Before the DRP, assessee submitted that most of the business of assessee is from the US region and the advances were given to the assessee's subsidiary for the purpose of overall growth of business of the group. It was submitted that amounts were given in the nature of quasi-equity and assessee has not borrowed any funds and there was NIL interest payment. It was further submitted that even the WOS does not have any loans from any third parties and so no interest rate could be bench marked. It was further submitted that there is no need for levy of interest as the amounts advanced were converted to equity. The DRP however, did not agree and held that these amounts were in the nature of loans and advances to AE and these transactions are clearly international transactions which require adjustment under the transfer pricing provisions. It upheld the decision of TPO not only in charging interest but also rate of interest.

4.2. It was the submission of the Ld. Counsel that company does not have any borrowed funds and has raised zero coupon bonds outside India which were invested for the purpose of equity at zero cost. It was further submitted that investment in subsidiary company is for the purpose of business and advances given upto 31-12-2011 were converted to equity. Ld. Counsel relied on the decision of the Co-ordinate Benches' decisions in the case of M/s. Prithvi Information Solutions Limited Vs. DCIT (ITA No. 472/Hyd/2014) for the proposition that no interest can be charged on the investment made by assessee in its own subsidiary. It also relied on the Co-ordinate Bench decision in the case of M/s. Vijai Electricals Ltd., Vs. Addl. CIT (ITA No. 842/Hyd/2012) and the decision of Hill Country Properties Ltd., Vs. Addl. CIT [48 taxmann.com 94] (Hyderabad-Trib.) Ld. Counsel also relied on the decision of DCIT Vs. Cadila Healthcare Ltd., [39 taxmann.com 51] for the same proposition. It was also contended that investment in subsidiary is not an international transaction as no income is generated. Ld. Counsel relied on the decision of M/s. Vodafone India Services (P.) Ltd., Vs. Union of India [50 taxmann.com 300] (Bombay) and Dana Corporation RE [321 ITR 178] and Amiantit International Holding Ltd., [322 ITR 678]. Ld. DR however, relied on the orders of TPO and DRP with reference to the above issue.

4.3. We have considered the rival contentions and perused the documents placed on record. From the orders of the TPO as well as the AO it is not clear whether the amount advanced is for the purpose of equity or the amounts advanced originally as loans and later converted to equity. Since facts are not clear, we are unable to give any finding whether the amounts advanced were in the nature of equity or not? TPO order in fact shows that the sums were shown as outstanding and he categorized them as interest free loans. There are also opening balances pertaining to earlier year to an extent of Rs. 43,12,68,000/-. It is not known whether department has accepted the advances in earlier year without any TP adjustment. In the absence of relevant facts, it is difficult to give a finding and apply various case law. Therefore, we are of the opinion that the facts required to be examined by the AO afresh. First of all, AO has to ascertain the nature of advances given to assessee whether it is loan or equity and how they are reflected in the respective accounts in the respective years. If assessee has invested them as investment in subsidiary they would be done under the head 'investment' otherwise, the same would figure under the head 'loans and advances'. Likewise, if the amount is advanced as the share capital, the same would also be shown as share application money in the subsidiary hands. These require factual verification. It is also required to verify whether the funds provider or from Zero coupon bonds subscribed abroad or funds from India and necessary approvals from RBI, SEBI, Company Law Board and other statutory authorities governing these funds and finances. Consequently, AO is directed to examine assessee's statements of accounts and also the necessary resolutions passed and information furnished to authorities to establish the nature of amounts advanced. If the amount is advanced towards loans, then, the transaction would be an international transaction and whether interest can be levied or not has to be examined in the light of the various decisions relied upon. What we also notice is that many of the decisions are not in the context of TP provisions but in the context of general income tax computation. Therefore, the issue is to be re-examined viz-a-viz case law relied upon and the applicable provisions of the Act. Then, the rate of interest would be an issue. In case interest is levyable, then, LIBOR+2% is generally accepted as the rate of interest to be levied on international transactions by various decisions of the Co-ordinate Benches. Therefore, without adjudicating the issue on this, we set aside the matter to the file of AO/TPO to re-examine the facts afresh and then decide the issue accordingly, keeping in mind the provisions and the case law relied upon. Assessee should be given an opportunity to substantiate the contentions. Ground Nos. 1 & 2 are accordingly considered allowed for statistical purposes".

6. We also adopt the same course of action *qua* the instant issue and restore it back to the AO/TPO to be adjudicated afresh in very terms as in AY.2010-11. It is further made clear that since the TPO has proposed the impugned adjustment @3.94% only, the DRP's directions enhanced it to 5% by way of 'limited relief' shall stand reversed.

7. All these grounds i.e., ground Nos.7 to 10 in AY.2011-12 and ground No.7 in AY.2012-13 are treated as accepted for statistical purposes in above terms. To sum-up, these twin assessee's appeals ITA Nos.329/Hyd/2016 and 602/Hyd/2017 are partly allowed for statistical purposes in above terms. A copy of this common order be placed in the respective case files.

*Order pronounced in the open court on 7<sup>th</sup> May, 2021*

Sd/-  
**(LAXMI PRASAD SAHU)**  
**ACCOUNTANT MEMBER**

Hyderabad,  
Dated: 07-05-2021

TNMM

Sd/-  
**(S.S.GODARA)**  
**JUDICIAL MEMBER**

*Copy to :*

*1.M/s.GSS Infotech Limited (formerly known as GSS America Infotech Limited), C/o. P. Murali & Co., Chartered Accountants, 6-3-655/2/3, 1<sup>st</sup>Floor, Somajiguda, Hyderabad.*

*2.The Dy.Commissioner of Income Tax, Circle-2(2), Hyderabad.*

*3.The Asst.Commissioner of Income Tax, Circle-2(2), Hyderabad.*

*4.Dispute Resolution Panel (DRP), Bengaluru.*

*5.Director of Income Tax (IT & TP), Hyderabad.*

*6.Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.*

*7.D.R. ITAT, Hyderabad.*

*8.Guard File.*