

ExxonMobil Company India Private Limited

Analysis of the order giving effect to Tribunal orders for the assessment years (AYs) 2006-07 to 2008-09

AY 2006-07

Background

1. ExxonMobil Company India Private Limited (EMCIPL) filed its return of income on 30 November 2006 declaring total taxable income of Rs.22,17,44,830 (rounded off).
2. The Assessing Officer ('AO') passed draft assessment order under section 143(3) of the Income-tax Act, 1961 ('the Act') proposing the transfer pricing adjustment of Rs.1,94,44,068 and disallowance out of entertainment expenses of Rs.2,61,761. EMCIPL filed objections before the Dispute Resolution Panel ('DRP'). The DRP vide directions dated 6 August 2010 issued directions to the AO.
3. Pursuant to these directions, the AO passed the final assessment order dated 20 September 2010 under section 143(3) read with section 144C(13) of the Act making the following disallowances / additions:
 - a) transfer pricing adjustment of Rs.1,24,03,828 on account of technical services;
 - b) transfer pricing adjustment of Rs.55,25,877 on account of back office support services;
 - c) disallowance of Rs.2,61,761 out of entertainment expensesAccordingly, the AO assessed the total income at Rs.23,99,36,290 (rounded off).
4. The Tribunal vide order dated 10 June 2011 decided the issue of adjustment on account of back office support services in favour of EMCIPL and set aside the matter to the file for limited purpose of quantification of the transfer pricing adjustment on account of technical services. The other issues were not pressed and therefore, dismissed.
5. Subsequently, the transfer pricing officer vide order dated 26 October 2019 under section 92CA(3) read with section 254 of the Act computed transfer pricing adjustment of Rs.1,26,13,049 on account of technical services and nil on account of back office support services.
6. The AO passed the OGE dated 7 February 2020 giving effect to the Tribunal order dated 10 June 2011. In the said order, the AO made addition of Rs.2,09,221 on account of adjustment of technical services and allowed relief of Rs.55,25,877 on account of adjustment towards back office support services in accordance with the aforesaid transfer pricing order dated 26 October 2019. Accordingly, the AO assessed income at Rs.23,46,19,640. The AO determined refund of Rs.2,00,52,385 (including interest under section 244A of Rs.28,55,848) in the OGE to the Tribunal order dated 10 June 2011.
7. EMCIPL received a refund of Rs.1,83,64,143 on 26 February 2021.

Analysis of the OGE to the Tribunal order dated 10 June 2011

Our observations, comments and way forward are as under:

| Sr. no. | Observations | Our comments |
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| 1. | Transfer pricing adjustment of Rs.1,26,13,049 on account of technical services | ITAT passed an order for limited purpose of quantification of the transfer pricing adjustment i.e. for verifying whether the arm's length price is within the +-5% range. As the same is not within the range, an adjustment of Rs.1,26,13,049 is made. |
| 2. | Transfer pricing adjustment of Rs.nil on account of back office support services | Following the transfer pricing order dated 26 October 2019, the AO granted full relief of Rs.55,25,877 on this account in the OGE to Tribunal order dated 23 May 2018. |
| 3. | Final order passed without passing draft order | The AO has passed the final OGE to the Tribunal order without passing draft order, ignoring the statutory provisions of section 144C of the Act. |
| 4. | Document identification number (DIN) | <p>With effect from 1 October 2019, all communication from tax department relating to assessment, appeals, orders, etc. shall carry a computer-generated DIN. In cases where manual communication is required to be issued, the reason for issue of manual communication without DIN has to be specified along with the date of obtaining written approval of the Chief Commissioner/Director General of Income-Tax in a particular format. Any communication which is not in conformity with the prescribed guidelines shall be treated as invalid and shall be deemed to have never been issued.</p> <p>In the present case, computer-generated DIN is not mentioned on the OGE to the Tribunal order. The AO by subsequent intimation dated 13 February 2020 has mentioned the DIN of OGE. Also, the order date is wrongly mentioned as 13 February 2020 instead of 7 February 2020.</p> |
| 5. | Order barred by limitation | It may be argued that order is barred by limitation prescribed under section 153 and therefore, the adjustment made should be deleted. |
| 6. | Disallowance of Rs.2,61,761 of entertainment expenses | EMCIPL has accepted this disallowance and has not pressed this issue before the DRP or Tribunal. Therefore, no variation is made in the OGE on this account. |
| 7. | Interest under section 234D of the Act | The AO charged interest under section 234D of Rs.16,38,263 as against Rs.11,75,576 (refer working). |
| 8. | Refund credited to wrong bank account | The refund of Rs.16,88,242 out of total refund of Rs.2,00,52,385 determined in the OGE is credited to wrong bank account. |

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| 9. | Shortfall in refund granted | The refund of Rs.34,08,612 is receivable by EMC IPL (refer working) along with interest under section 244A from March 2021 until refund is paid. |
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AY 2007-08

Background

1. EMC IPL filed its return of income on 29 October 2007 declaring total taxable income of Rs.35,21,33,075.
2. The AO passed draft assessment order dated 26 November 2010 under section 143(3) of the Act proposing the transfer pricing adjustment of Rs.1,40,95,164, disallowance under section 40(a)(i) (clause wrongly mentioned as (ia)) of Rs.1,32,31,238 and disallowance out of entertainment expenses of Rs.3,44,138. EMC IPL filed objections before the DRP. The DRP vide directions dated 25 August 2011 issued directions to the AO.
3. Pursuant to these directions, the AO passed the final assessment order dated 9 September 2011 under section 143(3) read with section 144C(13) of the Act making the following disallowances / additions:
 - a) transfer pricing adjustment of Rs.67,98,818 on account of technical services;
 - b) transfer pricing adjustment of Rs.72,96,346 on account of back office support services;
 - c) disallowance of Rs.1,25,60,485 under section 40(a)(ia)
 - d) disallowance of Rs.3,44,138 out of entertainment expenses

Accordingly, the AO assessed the total income at Rs.37,91,32,867 (considering rounded off returned income).
4. The Tribunal vide order dated 21 February 2018 deleted the disallowances under section 40(a)(i) and entertainment expenses. On the issue of transfer pricing adjustments, the Tribunal directed to exclude certain comparables and directed the AO to compute the arm's length price under both the segments by correctly computing the margin of the comparables.
5. Subsequently, the transfer pricing officer vide order dated 25 October 2019 under section 92CA(3) read with section 254 of the Act computed transfer pricing adjustment of Rs.57,06,062 on account of technical services and Rs.28,85,123 on account of back office support services.
6. The AO passed the OGE dated 7 February 2020 giving effect to the Tribunal order dated 21 February 2018. In the said order, the AO allowed relief of Rs.1,84,08,602 in accordance with the Tribunal order and transfer pricing order. Accordingly, the AO assessed income at Rs.36,07,24,260. The AO determined refund of Rs.1,29,98,742 (including interest under section 244A of Rs.42,94,205) in the said OGE dated 7 February 2020 giving effect to the Tribunal order dated 21 February 2018.
7. EMC IPL received a refund of Rs.1,29,98,742 on 26 February 2021.

Analysis of the OGE to the Tribunal order dated 23 February 2018

Our observations, comments and way forward are as under:

| Sr. no. | Observations | Our comments |
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| 1. | Transfer pricing adjustment of Rs.57,06,062 on account of technical services | Following the directions as per ITAT order, the TPO excluded comparables and recomputed the transfer pricing adjustment to Rs.57,06,062 (reduced from Rs.67,98,818). |
| 2. | Transfer pricing adjustment of Rs.28,85,123 on account of back office support services | Following the directions as per ITAT order, the officer excluded comparables and recomputed the transfer pricing adjustment to Rs.28,85,123 (reduced from Rs.72,96,346). |
| 3. | Final order passed without passing draft order | The AO has passed the final OGE to the Tribunal order without passing draft order, ignoring the statutory provisions of section 144C of the Act. |
| 4. | DIN | In the present case, computer-generated DIN is not mentioned on the OGE to the Tribunal order. The AO by subsequent intimation dated 13 February 2020 has mentioned the DIN of OGE. |
| 5. | Order barred by limitation | It may be argued that order is barred by limitation prescribed under section 153 and therefore, the adjustment made should be deleted. |
| 6. | Disallowance under section 40(a)(i) | Following the Tribunal order, AO granted full relief of Rs.1,25,60,485 on this account in the OGE to Tribunal order dated 23 February 2018. |
| 7. | Disallowance out of entertainment expenses | Following the Tribunal order, AO granted full relief of Rs.3,44,138 on this account in the OGE to Tribunal order dated 23 February 2018. |
| 8. | Education cess | The education cess is charged at 3 percent as against applicable rate of 2 percent. |
| 9. | Shortfall in refund | The refund of Rs.27,76,433 is receivable by EMC IPL (refer working) along with interest under section 244A(1) and section 244(1A) from March 2021 until refund is paid. |

AY 2008-09

Background

1. EMC IPL filed its return of income on 26 September 2008 declaring total taxable income of Rs.36,68,75,553.
2. The AO passed draft assessment order dated 9 December 2011 under section 143(3) of the Act proposing the transfer pricing adjustment of Rs.1,58,17,807, disallowance under

section 40(a)(i) (clause wrongly mentioned as (ia)) of Rs.1,28,79,606, addition on account of AIR reconciliation of Rs.3,32,02,536, interest on TDS of Rs.14 and disallowance out of entertainment expenses of Rs.4,33,158. EMCIPL filed appeal before the Commissioner of Income-tax (Appeals).

3. The Commissioner of Income-tax (Appeals) vide order dated 27 March 2014 confirmed the disallowance under section 40(a)(i), addition on account of AIR reconciliation, interest of TDS and disallowance of entertainment expenses. With respect to transfer pricing issue, the CIT(A) confirmed the adjustment. EMCIPL filed appeal before the Tribunal. EMCIPL filed appeal before the Tribunal.
4. The Tribunal vide order dated 23 May 2018 deleted the disallowances under section 40(a)(i) and entertainment expenses. The Tribunal restored back the issue of addition on account of AIR reconciliation to the file of the AO for fresh adjudication. On the issue of transfer pricing adjustments, the Tribunal directed to exclude certain comparables and directed the AO to compute the arm's length price under both the segments by correctly re computing the margin of the comparables.
5. Subsequently, the transfer pricing officer vide order dated 26 October 2019 under section 92CA(3) read with section 254 of the Act computed transfer pricing adjustment of Rs.74,90,396 on account of technical services and nil on account of back office support services.
6. The AO passed the OGE dated 7 February 2020 giving effect to the Tribunal order dated 23 May 2018. In the said order, the AO allowed relief of Rs.5,48,42,711 in accordance with the Tribunal order and transfer pricing order. Accordingly, the AO assessed income at Rs.39,43,65,963. The AO determined refund of Rs.1,29,51,521 (including interest under section 244A of Rs.38,74,521) in the said OGE dated 7 February 2020 giving effect to the Tribunal order dated 23 May 2018.
7. EMCIPL received a refund of Rs.52,65,297 on 26 February 2021.

Analysis of the OGE to the Tribunal order dated 23 May 2018

Our observations, comments and way forward are as under:

| Sr. no. | Observations | Our comments |
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| 1. | Transfer pricing adjustment of Rs.74,90,396 on account of technical services | Following the directions as per ITAT order, the officer excluded comparables and recomputed the transfer pricing adjustment to Rs.74,90,396 (reduced from Rs.81,59,761). |
| 2. | Transfer pricing adjustment of nil on account of back office support services | Following the transfer pricing order dated 26 October 2019, the AO granted full relief of Rs.76,58,046 on this account in the OGE to Tribunal order dated 23 May 2018. |
| 3. | Final order passed without passing draft order | The AO has passed the final OGE to the Tribunal order without passing draft order, ignoring the statutory provisions of section 144C of the Act. |

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| 4. | DIN | In the present case, computer-generated DIN is not mentioned on the OGE to the Tribunal order. The AO by subsequent intimation dated 13 February 2020 has mentioned the DIN of OGE. |
| 5. | Disallowance under section 40(a)(i) | Following the Tribunal order, AO granted full relief of Rs.1,28,79,606 on this account in the OGE to Tribunal order dated 23 February 2018. |
| 6. | Addition on account of AIR reconciliation | AO granted full relief of Rs.3,32,02,536 on this account in the OGE to Tribunal order dated 23 February 2018. |
| 7. | Disallowance out of entertainment expenses | Following the Tribunal order, AO granted full relief of Rs.4,33,158 on this account in the OGE to Tribunal order dated 23 February 2018. |
| 8. | Shortfall in refund determined and paid | <p>The AO has determined refund of Rs.1,29,51,521 in the OGE to Tribunal order dated 23 February 2018. However, EMC IPL has received refund of Rs.52,65,297 till date. Therefore, there is shortfall of Rs.76,86,224 in refund received.</p> <p>Further, interest under section 244A is payable until the date of grant of refund, Accordingly, EMC IPL is due for refund of Rs.82,76,229 (refer working) along with interest under section 244A(1) and section 244(1A) from March 2021 until refund is paid.</p> |