

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I' NEW DELHI**

**BEFORE SHRI S.V. MEHROTRA, ACCOUNTANT MEMBER
&
SMT. BEENA PILLAI, JUDICIAL MEMBER**

**I.T.A .No.-3235/Del/2014
(ASSESSMENT YEAR-2004-05)**

Corning SAS-India Branch Office, 2 nd Floor, DLF Building 9B, DLF Cyber City, Phase-III, Gurgaon. AAACC3889Q	vs	DDIT, Circle 1(2), International Taxation, New Delhi.
Appellant by	Shri Ajay Vohra, Sr. Adv. Shri Neeraj Jain, Adv.	
Respondent by	Ms. Deepika Agarwal, CA Ms. Averana Sharma, CIT DR	

Date of Hearing	27.11.2015
Date of Pronouncement	30.11.2015

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER:

The assessee has filed the present appeal against the order passed by the ld. DDIT, Circle 1(2), New Delhi, vide order dated 18/02/2014 for A.Y. 2004-05 on the following grounds:

1. *“That the CIT(A) erred on facts and in law in sustaining addition of Rs. 28,40,048/- on account of the alleged difference in the arm’s length price of the international transactions, on the basis of the order passed u/s 92CA(3) of the Act by the TPO.*

2. That the CIT(A) erred on facts and in law in inappropriately aggregating the international transaction of provision of agency services with market support services, without appreciating that such services ought to have been aggregated with the distribution segment, being closely linked with such segment.
- 2.1 That the CIT(A) erred on facts and in law in not appreciating that the distribution and agency segment relates to the same products, viz., ROBs and involves performing some of the common functions by the same employees and it is not feasible to segregate the cost relating to the same.
- 2.2 That the CIT(A) erred on facts and in law in not appreciating that the appellant does not employ any separate/ specific personnel/ asset for provision of agency services and same employees engaged in the distribution segment perform the necessary functions for provision of agency services.
- 2.3 That the CIT(A) erred on facts and in law in allocating common expenses to the agency segment in the ratio of sales, resulting in disproportionate allocation of expenses not commensurate with the functions per not appreciating that such expenses ought to have been allocated in the gross profit ratio.
- 2.4 That the CIT(A) erred on facts and in law in sustaining International Travel House Limited in the final set of comparable companies considered for the purpose of benchmarking agency services with market support services, without appreciating that the company had related party transactions in excess of 25% of revenue.
- 2.5 That the CIT(A) erred on facts and in law in not considering multiple year data of the comparable companies, required to iron out the fluctuations caused by business/economic/product life cycle.
- 2.6 That the DRP/TPO erred on facts and in law in not appreciating that use of single year data of the comparable companies may not adequately capture the market and business cycle reflected in the industry.

2.7 That the DRP/TPO erred on facts and in law in not allowing appropriate risk adjustment to establish comparability on account of the appellant being a low-risk-bearing captive service provider as opposed to the comparable companies who were independent entrepreneurs.

The appellant craves leave to add, alter, amend or vary from the aforesaid grounds of appeal before or at the time of hearing.”

2. From the above grounds, the assessee submitted that ground nos. 1, 2.1, 2.2, 2.4, 2.5, 2.6 & 2.7 are not pressed. The ld.AR submitted that the remaining grounds have been dealt with by this Tribunal in assessee own case vide order dated 28.08.2015, of the for A.Y. 2003-04 in ITA No. 2564/Del/2011. He submitted that the facts and circumstances are in the year under consideration are similar. He thus submitted that the grounds stands covered by the order of the Tribunal in the preceding assessment year in assessee's own case. Ld.DR has verified the same and has not objected to this submission made by the Ld.AR.

3. Ground no. 2:

“That the CIT(A) erred on facts and in law in inappropriately aggregating the international transaction of provision of agency services with market support services, without appreciating that such services ought to have been aggregated with the distribution segment, being closely linked with such segment.”

3.1. We see that the above ground has been dealt with by the Tribunal for A.Y. 2003-04 in paragraphs 24 & 25 which have been reproduced herein below:

24. “We have heard the rival submissions and perused the material on record. The first issue which involves

consideration as contended by the ld. Counsel for the assessee is that, the TPO/CIT(A) were incorrect in not benchmarking the functioning of import of products from M/s Corning SA France and receipt of agency commission from M/s Corning SA France. According to the assessee since both the functions dealt with the same products/same AE and were in respect of sales made to customer in India, therefore, ought to have been bench marked together, as was done by the appellant in its Transfer Pricing documentation. The conclusion however of the authorities below is that the distribution function and agency service function are not comparable. It has been found that distribution function involves import of furnished goods, its warehousing, advertisement marketing and distribution/sale of productions; whereas agency function involves coordination between customers and the head office and undertaking certain marketing and logistic services. Furthermore the risks assumed in distribution function are contract risk, marketing risk, credit risk, inventory risk etc.; whereas an agency functions assessee does not undertake contract risk, inventory risk, credit risk, etc. There is no dispute to the above findings arrived at by the authorities below.

25. Having regard to the above factual matrix we are thus inclined to uphold the conclusion of the CIT(A) to benchmark the two independent functions separately. We do not find any merit in the contention raised by the ld. Counsel that these are closely linked transactions undertaken by the appellant. On the contrary the nature of transactions are functionally different and even the risk assumed are different. We thus negate the stand of the assessee and uphold the findings of CIT(A) in benchmarking the distribution/agency function separately.”

3.2. Accordingly, following the order of the Tribunal in the preceding assessment year, being dismissed this ground of appeal filed by the assessee.

4. Ground no. 2.3:

“That the CIT(A) erred on facts and in law in allocating common expenses to the agency segment in the ratio of sales, resulting in disproportionate allocation of expenses not commensurate with the functions per not appreciating that such expenses ought to have been allocated in the gross profit ratio.”

4.1. We see that this ground has been dealt with by the Tribunal in the preceding assessment year at para 26 to 29 which have been reproduced herein below:

“26. So far as the allocation of expenses is concerned it is noted that the TPO had identified indirect expenses common to both the functions at Rs. 1,93,29,321/- details of which are as under:

Particulars	Amount (Rs.)
Salaries	42,72,231/-
Advertisement	30,78,570/-
Insurance	3,77,758/-
Repairs & Maintenance	8,24,105/-
Professional fee	28,31,227/-
Rent	12,57,636/-
Communication	5,93,240/-
Travelling & Conveyance	33,79,299/-
Misc.	12,32,610/-
Depreciation	14,82,645/-
Total (A)	1,93,29,321/-

27. The CIT(A) has held that out of the aforesaid sum of Rs. 30,78,570/- and Rs. 3,77,758/- pertaining to advertisement and insurance have no nexus with the agency function.

28. We find merit in the said conclusion as no material has been lead to discredit the above conclusion. Thus we hold that aggregate indirect expenses common to both the functions are of Rs. 1,58,72,993/- (Rs. 1,93,29,321/- - Rs. 30,78,570/- - Rs. 3,77,758/-). The CIT(A) further more held that allocation of such expenses should be done on the basis of gross margin of distribution function and commission income receipts and not on the basis of sales, as adopted by the TPO. Here too, we do not find any

*infirmity in the approach adopted by the CIT(A). The CIT(A) has correctly held that allocation of expenses in proportion to sales[**the Id.Counsel submitted that it should be gross margins as held by Id.CIT(A)**] would amount to give equal weightage in terms of functions performed, assets utilized and risks assumed to both distribution function as well as agency service activity, which otherwise involves much lesser functions and utilization of assets and risk. The CIT(A) has held as under:*

“It would not be correct to allocate expenses attributed to purchase/sale of finished goods, warehousing and handling of inventory etc., to the agency service activity, wherein such activities are not involved. Allocation of common expenses in proportion to gross margin/income from the distribution function and the commission income, irons out or eliminate the impact of purchase of finished goods, handling of inventory and undertaking distribution function, etc. Allocation of common expenses in proportion to gross margin from distribution function and commission income is a reasonable and, rationale basis of allocating of such common expenses between the two activities. I accordingly uphold allocation of common cost by the assessee and accordingly computed the adjustment after combining the agency service activity with marketing service function, as follows:

Particulars	Rupees
<i>Income from market support services</i>	<i>3,41,76,307</i>
<i>Add: Commission income</i>	<i>55,94,311</i>
<i>Total income from market support and agency service activity</i>	<i>3,97,70,618</i>
<i>Cost for market support (from letter dt. 16.11.2000)</i>	<i>3,21,05,659</i>
<i>Cost for commission income (as determined in para 21.3 above)</i>	<i>27,55,968</i>
<i>Total aggregated cost</i>	<i>3,48,61,627</i>
<i>Arm's length marketing support service and agency service income (A)</i>	<i>3,75,38,999</i>
<i>Marketing support and agency service income earned by the appellant (B)</i>	<i>3,97,70,618</i>
<i>Difference (A-B)</i>	<i>(-) 22,31,619</i>

Since total income from market support and agency service activities at Rs. 3,97,70,618/- is higher than the arm's length price of such services, computed as per basis adopted by the TPO at Rs. 3,75,38,999/-, no adjustment

on this account is warranted. Accordingly, adjustment of Rs. 20,87,795/- in respect of international transactions of agency service activity is, therefore, not sustainable and is directed to be deleted.”

29. *Having regard to the above factual conclusion we uphold the action and reject the grounds raised by the Revenue. Ground no. 1 thus stands dismissed.*

4.2. We, therefore, following the orders of the Tribunal for assessment year 2003-04, allow this ground in the appeal filed assessee.

5. In the result, the appeal filed by the assessee is partly allowed.

The order is pronounced in the open court on 30/11/2015

**Sd/-
(S.V. MEHROTRA)
ACCOUNTANT MEMBER**

**Sd/-
(BEENA PILLAI)
JUDICIAL MEMBER**

Dated: 30.11.2015

**Kavita, P.S.*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

		Date
1.	Draft dictated on	30.11.2015
2.	Draft placed before author	30.11.2015
3.	Draft proposed & placed before the second member	
4.	Draft discussed/approved by Second Member.	
5.	Approved Draft comes to the Sr.PS/PS	30.11.2015
6.	Kept for pronouncement on	30.11.2015
7.	File sent to the Bench Clerk	30.11.2015
8.	Date on which file goes to the AR	
9.	Date on which file goes to the Head Clerk.	
10.	Date of dispatch of Order.	