IN THE INCOME TAX APPELLATE TRIBUNAL "C", BENCH KOLKATA

BEFORE SHRI A. T. VARKEY, JM &DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.112/Kol/2017

(निर्धारणवर्ष / Assessment Year: 2012-13)

Chryso India Private Limited (formerly known as 'The structural Waterproofing Company Private Limited') Plot No.D-30/7, TTC Industrial Area, M.I.D.C, Turbhe, Navi Mumbai-400 705 (Maharashtra)	**Vs.**	**A.C.I.T, Circle-10(2), Kolkata** Aayakar Bhavan, P-7, Chowringhee Square, Kolkata – 700 069.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. :**AABCT 0878 M**		
(Appellant)	**..**	**(Respondent)**

Appellant by :Shri Akhilesh Gupta, AR
Respondent by :Shri G. Mallikarjuna, CIT, DR

सुनवाईकीतारीख/ **Date of Hearing : 05/04/2018**

घोषणाकीतारीख/**Date of Pronouncement : 04/05/2018**

आदेश / O R D E R

Per Dr. A. L. Saini:

The captioned appeal filed by the Assessee, pertaining to Assessment Year 2012-13, is directed against a fair assessment order passed by the Assessing Officer u/s 144C read with section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'), dated 21.12.2016, which incorporates the directions given by the Dispute Resolution Panel ('DRP') – 2, New Delhi, order dated 07.10.2016.

2. The Grievances raised by the Assessee are as follows:

*"1. **Erroneous determination of arm's length price by the learned TPO/AO for management services received by the Appellant***

1.1. The DRP and the learned TPO/AO erred in making an adjustments of Rs. 68,81,619/- to the Arm's Length Price of the international transaction relating to Management and other administrative Services received by the Appellant by

considering the ALP as NIL without followed any prescribed transfer pricing methods as per Income Tax Act, 1961;

1.2. The DRP and the learned TPO/AO erred in rejecting the transfer pricing documentation undertaken by the Appellant to satisfy the arm's length criteria with respect to the management and support Services received;

1.3. The DRP and the learned TPO/AO erred in concluding that the services received by the Appellant from the AE are in the nature of stewardship and shareholder services leading to direct benefit to the AE and no proximate benefit to the Appellant;

1.4. Without prejudice to the above The DRP though accepted that certain benefits did accrue to the Appellant but failed to provide any relief;

1.5. The learned TPO erred in completely disregarding the benefits received by the Appellant, thus failed to appreciate the commercial wisdom/ expediency of the Appellant;

1.6. The DRP and the learned TPO/AO failed to appreciate the fact that the administrative services were rendered by the AE at loss, which indicates that the transaction is inherently at arm's length and also misconstrued it to not possible in commercial scenario, rather than appreciating the above;

2. ***Initiation of penalty proceedings***

2.1 The Appellant submits that based on the facts and the circumstances of the case, there was no basis for the Assessing Officer to propose to initiate penalty proceedings u/s 271(1)(c) of the Act.

The Appellant submits that the above grounds are independent and without prejudice to one another.

The Appellant desires leave to add, to alter, by deletion, substitution or otherwise, any or all of the above grounds of objections, at any time before or during the hearing of the Appeal."

3. The brief facts apropos this issue are that the assessee company is engaged in the business of manufacturing concrete admixtures, cement additives, water proofers, water-sellers, floorings, liquid membrane coatings, curing compounds, cement grouts, chemical grouts, poly-sulphide sealants, repair mortars etc. As the assessee had international transactions with its Associated Enterprise (A.E.), the case of assessee was referred to the Transfer Pricing Officer (TPO). After considering the submission of the assessee, the TPO passed the order u/s 92CA(3) on 27.01.2016 making the arm's length price adjustment at Rs.2,28,69,138/-. A draft assessment order

was communicated to the assessee company. The assessee company filed application before the DRP against the issues involved in the draft assessment order. The DRP had passed order on 07.10.2016 giving certain direction. In pursuance of the direction of the DRP a fresh order u/s 92CA(3) read with section 144C was passed by the TPO on 22.11.2013. The TPO in his order had made arm's length price adjustment to the tune of Rs.68,81,619/-. The Assessing Officer as per the order of the TPO made the addition to the tune of Rs.68,81,619/- as arm's length price on account of management services received by the assessee company.

4. When the case was referred to the TPO for determination of arm's length price in respect of management services, the ld. TPO observed that the entire services are stewardship in nature and received by the Associate Enterprises for maintenance of overall control of the group. The relevant observations of the ld. TPO are given below:

> *"The assessee has claimed payment of Rs.68,81,619/- under the head management services fee paid to the AE. On examination of the details, it is noted that the services rendered by the AE is in the form of Intra-Group services. The issue came up for the examination in the TP proceeding for the AY 2011-12 by the TPO concerned and after due deliberation of the facts and relevant legal precedence and practices in the international transfer pricing, the TPO has differentiated the transaction from the TNMM analysis and treated the services as stewardship services rendered by the AE for maintenance for overall control over the Group. With this above observation, the TPO has treated the arm's length price of the above services at NIL for the Assessment Year 2012-13. It may also be mentioned that the assessee did not benchmark the services in an independent manner and failed to provide any comparable cost that it may have to incur if it procure such services from any independent source. The Ld. DRP while adjudicating assessee's petition for the AY 2011-12 has upheld the decision of the TPO.*
>
> *The nature of services being the same and to maintain judicial continuity, the undersigned hereby treated the arm's length price of the management services at NIL. Accordingly, adjustment of Rs.68,81,619/- is to be made under the head management services."*

5. In pursuance of the order of the TPO, the ld. Assessing Officer made the addition to the tune of Rs.68,81,619/-.

6. Aggrieved by the order of the ld. TPO/Assessing Officer, the assessee filed objection before the Dispute Resolution Panel (DRP) who has dismissed the objections of the assessee observing as follows:

*"6. **Determination of arm's length price by the learned TPO for management services received by the assessee**.*

6.1 The learned TPO erred in making adjustments of Rs. 68,81,619/- to the ALP of the international transaction relating to management and other Administrative Services received by the Assessee by considering the ALP as NIL and by not accepting the ALP of the international transaction as recorded in the books of account of the Assessee;

DRP Directions:

So called Administrative services have been rendered by the AE or a group of AEs. It has to be seen that as to whom the assessee sells and through whom the distribution is done. Even when there are stewardship services for controlling the entity by the parental group, the allowability of such expenses on the Indian entity will be questionable to say the least. Further, TPO is well within his statutory domain to determine ALP for the intra group services rendered per force to the assessee.

The TPO has dealt with Intra Croup Services in para 6 at page 9 of the order. The profile of services indicates clearly that there is a clear intent of monitoring and control by the AE in this regard. Ld AR also submitted that it is a group practice to maintain uniform standards by the AE. It is the key to rendering of services by the AE so as to maintain uniformity, operational supremacy and control on the varied group entities. The practice of such services is prima facie on account of need to shepherd the group entities to a standardized approach to all the issues, processes etc so as to convey identical impression and generate identical solutions also. It has been contended by the A/R in the course of the submission that the AE has also borne part of such expenses. This further buttresses the position taken by the TPO as the plain commercial transaction would not impel the AE to forego its costs/revenues unless there is a clear corporate motive to achieve standardization of actions/solutions so as to protect and enhance the group image and margins and also promote the entity as a whole.

Though the direct and ostensibly visible benefit to the assessee by availing such services is not clear from the data furnished, yet, it may be reasonably assumed that the assessee did garner some nominal benefits by availing such services in form of trouble shooting at times to resolve certain issues. There is no objective way in which use of services can be measured and as is the commercial practice even in market factors driven situation, the costs are shared in accordance with some objective criterion, including sales revenues and number of employees. Similar issues have been dealt with in various issues before the ITAT in Dresser Rand India P Ltd (47 SOT 423 [Mumbai] 2012), Knorr Bremse India P Limited (ITA no. 5097/Del/2011 - Asstt. Yr: 2007-08). Hon'ble Delhi High Court had the occasion to elucidate the issue in EKL Appliances ([2012] 24 Taxmann.com 199 Delhi/ 345 ITR 241 Delhi), specific findings in para 22 of the orderare – '22. Even Rule 10B(1)(a) does not authorize disallowance of any expenditure on the ground that it was not necessary or prudent

for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure canno doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure,_____"

In view of the above and the facts of this case, the objection of the assessee is dismissed."

7. Aggrieved by the order of the DRP/Assessing Officer, the assessee is in appeal before us.

At the outset, the ld. Counsel for the assessee vehemently submitted before us that management services have resulted in effective cost savings by way of an effective purchase function, technical assistance in relation to certain products being provided by AE (the expertise of which was not available with assessee) and other ancillary functions like IT management for which the assessee did not have requisite staff to perform functions. These management services were necessary for the assessee to function efficiently and stay relevant in terms of cost competency, fix day to day IT related issues, etc. The ld. Counsel pointed out that the ld. TPO had not gone into the details of each activity received by the assessee and tried to figure out the specific benefit to the assessee. The ld. TPO had not made any attempt to show how the activities received by the assessee are for the direct and proximate benefit of the parent company. By way of reduction in cost, assessee was able to remain cost effective and compete in the market place. The assessee derived the advantage of the specialized skill of the purchase department of Chryso SAS since they have long standing relationships and experience with the suppliers of raw materials. With this background, the ld. Counsel for the assessee submitted before us that the said issue is squarely covered by the Hon'ble ITAT Kolkata in the assessee's own case, in ITA No.127/Kol/2016 Assessment Year 2011-12 dated 05.04.2017 wherein it was held as follows:

16. With regard to the payment of Management Service charges to AE by the assessee, we find that the assessee had clearly demonstrated that management services have resulted in effective cost savings by way of an effective purchase function, technical assistance in relation to certain products being provided by AE (the expertise of which was not available with assessee) and other ancillary functions like IT management for which the assessee did not have requisite staff to perform functions. The services were necessary for the assessee to function efficiently and stay relevant in terms of cost competency, fix day to day IT related issues , etc. The assessee made detailed submissions regarding management services to substantiate the benefit received from it vide its submissions dated 13.1.2015. The assesseeeven demonstrated the cost incurred for rendering management services by the AE and the losses incurred by AE for the years ending 2010 and 2011 thereon, thereby proving that despite the recovery of management fees from the assessee , the AE had only incurred losses. We find that the assessee had clearly demonstrated the necessity of paying the management fees to its AE in detail together with the various benefits derived by it and for this purpose, it had also produced the entire exchange of emails on the impugned issue. We also find that the assessee had met each and every aspect of the objections raised in the said emails by the ld TPO. The ld TPO simply brushed aside the replies given by the assessee in this regard and simply concluded that the services rendered are in the nature of control and monitoring activity and hence they are only stewardship services, for which no charge is required to be paid by the assessee. Accordingly the ld TPO determined the ALP of the management charges atRs Nil. The ld DRP agreed that the assessee had received services from AE and had also received some benefits out of it. We find from the details of services rendered by the AE to the assessee as enumerated elsewhere in this order, the services have been received from the AE for day to day managerial functions in the course of normal business activities and which is practiced by many global organisations for smooth and efficient functioning. The services were for the direct and proximate benefit of the assessee and cannot be regarded as a shareholder activity. The reliance placed in this regard on the co-ordinate bench decision of Mumbai Tribunal in the case of Dresser –Rand India Pvt Ltd vs.Addl CIT reported in (2011) 13 taxmann.com 82 (Mum Trib) is well founded. We find that the assessee had applied TNMM as the most appropriate method and no efforts were made by the ld TPO to show as to how TNMM is not appropriate for benchmarking the management services. The assessee had already made out a case that it did not have any requisite staff to perform the functions performed by its AE and hence the ld TPO's contention of questioning the commercial justification for the services is totally uncalled for. The ld AR also submitted that it is a group practice to maintain uniform standards by the AE. It is the key to rendering of services by the AE so as to maintain uniformity, operational supremacy and control on the varied group entities. The practice of such services is prima facie on account of need to shepherd the group entities to a standardized approach to all the issues, processes etc. so as to convey identical impression and generate identical solutions also. We find lot of force in this argument of the ld AR that the services rendered by the AE to the assessee in the form of uniform policies and practices and standardized approach to all the issues by having common attestation functions across the globe would greatly assist in the consolidation at global level and hence to that extent the necessity of AE rendering the managerial services to the assessee and its group companies is justified. Once the same is justified, there is no harm in making payment for those services. We hold that the ld TPO ought not to have determined the ALP of the management charges at Rs Nil by stating that the same need not be incurred by the assessee on the grounds of commercial expediency. This, in our considered opinion, would be beyond the jurisdictional powers of the ld TPO. The duty of the ld TPO would be to determine the ALP of a particular transaction and he cannot get into the propriety of the transaction

while determining the ALP. We find that the ld DRP observed that though the direct and ostensible visible benefit to the assessee by availing such services is not clear from the data furnished, yet, it may be reasonably assumed that the assessee did garner some nominal benefits by availing such services in the form of trouble shooting at times to resolve certain issues. This goes to prove that the ld DRP had also agreed to the benefits derived by the assessee out of the services rendered by the AE for which management fees is paid by the assessee. We find that the assessee had specifically replied that it was benefitted by substantial cost reduction on an overall basis by utilizing the services rendered by its AE pursuant to the management services agreement. We find that the decision relied upon by the ld AR on the Hon'ble Delhi High Court in the case of CIT vs Cushman and Wakefield (India) (P) Ltd reported in (2014) 367 ITR 730 (Del) is well founded wherein it was held that :-

"35. The Transfer Pricing Officer's report is, subsequent to the Finance Act, 2007, binding on the Assessing Officer. Thus, it becomes all the more important to clarify the extent of the Transfer Pricing Officer's authority in this case, which is to determining the arm's length price for international transactions referred to him or her by the Assessing Officer, rather than determining whether such services exist or benefits have accrued. That exercise - of factual verification is retained by the Assessing Officer under Section 37 in this case. Indeed, this is not to say that the Transfer Pricing Officer cannot -after a consideration of the facts - state that the arm's length price is 'nil' given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the Transfer Pricing Officer stating that the assessee did not benefit from these services, which amounts to disallowing expenditure. That decision is outside the authority of the Transfer Pricing Officer.

36. In this case, the issue is whether an independent entity would have paid for such services. Importantly, in reaching this conclusion, neither the Revenue, nor this Court, must question the commercial wisdom of the assessee, or replace its own assessment of the commercial viability of the transaction. The services rendered by CWS and CWHK in this case concern liaising and client interaction with IBM on behalf of the assessee-activities for which, according to the assessee's claim-interaction with IBM's regional offices in Singapore and the United States was necessary. These services cannot - as the Income-tax Appellate Tribunal correctly surmised-be duplicated in India insofar as they require interaction abroad. Whether it is commercially prudent or not to employ outsiders to conduct this activity is a matter that lies within the assessee's exclusive domain, and cannot be second- guessed by the Revenue." [brackets provided by us]

16.1. We also find that the co-ordinate bench of this tribunal in the case of DCIT vs Bata India Ltd reported in (2016) 69 taxmann.com 120 (Kolkata Trib) dated 6.4.2016 had considered the decisions of Hon'ble Delhi High Court in the case of CIT vs EKL Appliances Ltd (2012) 345 ITR 241 (Del) ; CIT vs Cushman & Wakefield (India) (P) Ltd (2014) 367 ITR 730 (Del) and co-ordinate bench of Mumbai Tribunal in the case of Dresser Rand India (P) Ltd vsAddl CIT (2011) 47 SOT 423 (Mum) and applied the principles emanating out of those judgements and applied the same to the facts of the case in Bata India Ltd. In the said case (i.e Bata India Ltd supra) it was observed as under:-

***27.** The Hon'ble High Court of Delhi in the case of CIT v. EKL Appliances Ltd.[2012] 345 ITR 241/24 taxmann.com 199/209 Taxman 200 as well as CIT v. Cushman & Wakefield (India) (P.)Ltd.[2014] 367 ITR 730/46 taxmann.com 317 (Delhi), rendered similar ruling as was rendered in the case of Dresser-Rand India (P.) Ltd. (supra).In*

the case of Cushman & Wakefield India (P.) Ltd. (supra), the Hon'ble Delhi High Court observed that whether a third party - in an uncontrolled transaction with the Taxpayer would have charged amounts lower, equal to or greater than the amounts claimed by the AEs, has to perforce be tested under the various methods prescribed under the Indian TP provisions. In the context of cost sharing arrangement, the Hon'ble High Court opined that concept of base erosion is not a logical inference from the fact that the AEs have only asked for reimbursement of cost. This being a transaction between related parties, whether that cost itself is inflated or not only is a matter to be tested under a comprehensive transfer pricing analysis. The basis for the costs incurred, the activities for which they were incurred, and the benefit accruing to the Taxpayer from those activities must all be proved to determine first, whether, and how much, of such expenditure was for the purpose of benefit of the Taxpayer, and secondly, whether that amount meets ALP criterion. In the present case however, the arrangement between the AE and the Assessee is not a cost sharing arrangement but a payment for specific services rendered. To this extent the above observations of the Hon'ble High Court may not be relevant to the present case.

***28.** The following aspects would require consideration in order to identify intragroup services requiring arm's length remuneration:*

- Whether services were received from related party.

- Nature of services including quantum of services received by the related party.

- Services were provided in order to meet specific need of recipient of the services.

- The economic and commercial benefits derived by the recipient of intragroup services.

- In comparable circumstances an independent enterprise would be willing to pay the price for such services?

- An independent third party would be willing and able to provide such services?

Whether payment made to AE meets ALP criterion will be determined, keeping in mind all the above factors, as well.

***29.** Keeping in mind the principles emanating from the aforesaid decisions, we shall now proceed to examine the material on record to see the nature of services received by the Assessee and as to whether the same were at Arm's Length.*

***47.** In the light of the discussion in paragraphs 30 to 46, We hold that the Assessee has established the nature of services including quantum of services received by the related party, that services were provided in order to meet specific need of the Assessee for such services, the economic and commercial benefits derived by the Assessee of intragroup services.*

16.2. We also find that in the recent decision of the Hon'ble Delhi High Court in the case of Knorr-Bremse India (P) Ltd vs ACIT reported in (2016) 380 ITR 307 (Del) wherein the relevant head notes is reproduced hereinbelow :-

Section 92C of the Income-tax Act, 1961 - Transfer pricing - Computation of arm's length price (Comparables and adjustments/Adjustments - General) - Assessment year 2007-08 - Whether answer to issue whether a transaction is at an arm's length price or not is not dependent on whether transaction results in an increase in

assessee's profit; mere failure to establish that transactions resulted in a profit does not indicate that they were not at an arm's length price and even if profit is established, it does not necessarily follow that transaction was at an arm's length price - Held, yes [Para 21]

We find that this judgement had approved the earlier decision of Hon'ble Delhi High Court in the case of Cushman and Wakefield (India) (P) Ltd supra and also the decision of EKL Appliances supra.

16.3. In view of the aforesaid findings and respectfully following the judicial precedents relied upon hereinabove, we hold that the determination of ALP for Management Support Services at Rs NIL is unwarranted and accordingly the adjustment made by the ld TPO in the sum of Rs. 52,26,683/- is deleted. Accordingly, the Ground Nos. 7 to 7.6 raised by the assessee are allowed."

8. We have given a careful consideration to the rival submissions and perused the material available on record, we note that as the issue is squarely covered in favour of the assessee by the decision of the Coordinate Bench (stated supra) in assessee's own case and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings. Therefore, we are of the view that arm's length price adjustment made by the DRP/Assessing Officer in respect of management services to the tune of Rs.68,81,619/- needs to be deleted. Accordingly, we delete the arm's length price adjustment in relation to management services to the tune of Rs.68,81,619/-.

9. In the result, the appeal filed by the assessee, is allowed.

10. Ground No.2 raised by the assessee relates to initiation of penalty proceedings u/s 271(1)(c) of the Act. We note that this ground is pre-mature and consequential in nature and does not require adjudication.

Order is pronounced in the open court on 04/05/2018.

Sd/-	**Sd/-**
(A. T. VARKEY)	**(A. L. SAINI)**
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

कोलकाता /Kolkata;
दिनांक Date:04/05/2018
(RS, SPS)

<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी/ The Appellant- Chryso India Private Limited (formerly known as 'The structural Waterproofing Company Private Limited')
2. प्रत्यर्थी/ The Respondent-A.C.I.T, Circle-10(2), Kolkata
3. आयकरआयुक्त(अपील) / The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, **कोलकाता**/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.

सत्यापितप्रति

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By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.