

THE INCOME TAX APPELLATE TRIBUNAL
“K” Bench, Mumbai
Before Shri B.R. Baskaran (AM) & Shri Ramlal Negi (JM)

I.T.A. No. 506/Mum/2016 (Assessment Year 2011-12)
I.T.(TP).A. No. 1261/Mum/2017 (Assessment Year 2012-13)

M/s. SAS Institute (India) Pvt. Limited Office Premises No. 31 3 rd Floor, 4 North Avenue Maker Maxity Bandra Kurla Complex, Bandra(East) Mumbai-400051. PAN : AAEC3149K (Appellant)	Vs.	ACIT 1(3)(1) Mumbai. (Respondent)
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Assessee by	Shri M.P. Lohia & Shri Hemen Chandariya
Department by	Shri Jayant Kumar
Date of Hearing	22.5.2018
Date of Pronouncement	22.5.2018

ORDER

Per B.R. Baskaran (AM) :

Both the appeals filed by the assessee are directed against the order passed by the Assessing Officer in pursuance of direction given by learned DRP and they relate to A.Ys. 2011-12 and 2012-13. Both the appeals were heard together and are being disposed of by this common order, for the sake for convenience.

2. The common issue urged in both the appeals relates to the Transfer Pricing adjustment made to the license fee paid by the assessee. The facts relating thereto are that the assessee is engaged in the business distribution of software developed by its parent company SAS Institute Inc, USA. The assessee paid 50% of the license fees collected by it as “royalty” to its parent company. The assessee adopted CUP method for benchmarking above said

international transaction and for that purpose, it took the case of another distributor appointed in Israel as comparable. It was shown that the Israeli distribution has also paid 50% of license fees as royalty. The TPO did not accept CUP method and proceeded to determine arm's length price by using TNMM method in both the years. The same was upheld by DRP in both the years.

3. The Learned AR submitted that an identical issue arose in A.Ys. 2008-09 & 2010-11 i.e. in those years also, the TPO rejected CUP method adopted by the assessee and proceeded to determine arm's length price under TNMM method. In those years also, the TPO did not assign any reason for rejecting CUP method adopted by the assessee. Under these set of facts, the Coordinate Bench has restored the matter in both the years to the file of the TPO to examine this issue afresh by passing a speaking order.

4. The Learned AR further submitted that in A.Y. 2013-14 also, the TPO rejected the CUP method adopted by the assessee and determined arm's length price under TNMM method. However, learned DRP has deleted the adjustment so made by the TPO and accepted CUP method as most appropriate method. Accordingly, the learned AR submitted that the issue contested in these two years may be decided by following decision rendered by learned DRP in A.Y. 2013-14.

5. On the contrary, learned DR submitted that the assessee has taken foreign entity as comparable entity for determining arm's length price under CUP method. He submitted that the assessee did not furnish details of volume of transactions, difference in geographic conditions etc., which are essential features that need to be considered in order to examine as to whether the Israel-company can be taken as comparable. He further submitted that the assessee has furnished only distribution agreement of earlier years and did not furnish agreement relevant to the year under consideration. The Learned DR further submitted that distribution agreement provides for terms and condition

for distribution, provision for various services and payment of royalty. Even though the assessee was providing different kind of services, it is necessary to adopt integrated approach for determining arm's length price as held by Hon'ble Punjab & Haryana High Court in the case of Knorr-Bremse India (P) Ltd vs. ACIT (2016) 380 ITR 307. Accordingly, the learned DR submitted that the issue may be restored to the file of the Assessing Officer/TPO for examining it afresh, as held by Coordinate Bench of Tribunal in assessee's own case for A.Y. 2008-09 & 2010-11.

6. We have heard the rival contentions on this issue. We noticed that the Coordinate Bench of the Tribunal has restored an identical issue to the file of the Assessing Officer/TPO in A.Y. 2008-09 in ITA No. 6842/Mum/2012 dated 24.4.2016 with following observations :-

“15. We have heard both the parties and perused the orders of the Revenue Authorities as well as the relevant paper books filed before us. The undisputed facts are that the TPO has not given any reasons for rejecting the CUP/RPA methods adopted by the assessee in respect of ‘royalty’ and other international transactions. It is also a fact that the TPO travelled in the wrong presumption that the assessee used TNMM method for benchmarking the transaction as evident from the language used in the order of the TPO. It is undisputedly wrong as the TP study indicates the application of different methods for different transactions by the assessee, which are already extracted and placed in the above paras of this order. The aggregation approach of benchmarking the international transactions by the TPO is not sustainable as per the today's legal position. It is trait law that the transactions have to be independently benchmarked applying the appropriate method in benchmarking of the transactions. We also perused the submissions of the assessee before the TPO wherein it was categorically submitted by the assessee that the reasons for rejection of the CUP and RPA methods should be given to the assessee and the same is part of the submissions. But, either the Assessing Officer or the TPO/DRP is bothered to furnish the same. In fact, as seen from para 7.3 of the DRP order, the onus is kept on the assessee by mentioning that the assessee agreed for substituting the TNMM method as an appropriate method, which is not proper. Considering the above deficiencies, inaccurate and incompleteness, we are of the opinion the matter should be set aside to the file of the TPO/Assessing Officer for fresh adjudication of the above referred Ground Nos. 8,9 and 10. Assessing Officer/TPO shall grant a reasonable opportunity of being heard to the assessee as per the set

principles of natural justice. In the set aside proceedings, the Assessing Officer/TPO is directed not to resort repeating of the same additions without passing a speaking order on the following issues which are connected to the grounds raised above.

- 1. Whether the CUP method, used by the assessee is most appropriate on in respect of the assessee's international transaction? if not, reasons for rejecting the same*
- 2. Whether the TNMM method, which is considered by the TPO, is the most appropriate method for benchmarking the software licensing revenue segment? If yes, reasons for considering the same?*
- 3. Whether the transfer pricing adjustment should be made only to the value of the assessee's international transactions with its AEs or on the total turnover of the software licensing revenue segment?*
- 4. Any other relevant issue, if any.*

16. Accordingly, the said ground Nos. 8,9 and 10 are allowed for statistical purposes.”

7. The decision rendered by the Tribunal in A.Y. 2008-09 was followed by the Tribunal in A.Y. 2010-11 in ITA No. 1598/Mum/2015. Even though learned AR submitted that the order passed by learned DRP in A.Y. 2013-14 may be followed, yet we prefer to follow the decision rendered by the Coordinate Bench in A.Y. 2008-09 & 2010-11. Accordingly, we set aside the order passed by the Assessing Officer on this issue and restore the same to the file of the Assessing Officer/TPO with identical direction as given in A.Y. 2008-09.

8. In A.Y. 2012-13, the assessee is also contesting the decision of the learned CIT(A) in confirming the disallowance of ₹ 184.73 lakhs made u/s. 40(a)(ia) of the Act. The Assessing Officer noticed that the tax auditor has reported a sum of ₹ 375.83 lakhs as the amount disallowable u/s. 40(a) of the Act. The Assessing Officer noticed that the assessee has disallowed only ₹ 191.09 lakhs and did not disallow following amount paid to non-residents:

Name of party	Amount
SAS Portugal	173.81 lakhs
SAS Romania	3.12 lakhs
SAS Institute Inc	<u>7.80 lakhs</u>
	<u>184.73 lakhs</u>

When questioned, the assessee submitted that the above said payments are in the nature of compensatory payments and they constitute business receipts in the hands of the recipient and hence the same is not taxable in India as they don't have permanent establishment, in which case, there is no liability to deduct tax at source u/s. 195 of the Act. With regard to nature of payment, it was submitted that the assessee's domain is to distribute its software products within India. Sometime it may so happen that business group may be having branches in other countries and the assessee herein would be supplying software product to the business group, which would be utilised in other countries. In that situation, distributor of the assessee's parent company located in concerned foreign countries would be constrained to lose that business. Hence, in order to take care of this kind of eventuality, the agreement entered by the assessee with the parent company provides for payment of compensatory amount to the distributors located in those countries. Accordingly, the above said sum of ₹ 184.73 lakhs was paid to distributors located in other countries. Accordingly, it was submitted that the above said payment constitute business receipts in the hands of the recipient and since they did not have permanent establishment in India the same is not taxable.

9. The assessee also submitted that the tax auditor has committed a mistake in reporting these transactions as the transactions liable for deduction of tax at source. The assessee further submitted that the assessee has furnished details of payment as per requirement of section 195(6) of the Act in Form No. 15CA and 15CB. He submitted that the Form No. 15CB is a certificate obtained from a Chartered Accountant and in the said form it is clearly stated that the payments made to the foreign companies are in the

nature of business receipts. Since the assessee has correctly reported nature of payment in Form No. 15CA & 15CB, which forms are specific forms given to report the details payments made to foreign companies, they should have more evidentiary value than the report of tax auditor. Accordingly the assessee submitted that the Assessing Officer was not correct in placing reliance on the tax audit report.

10. The Assessing Officer, however, took the view that the assessee has paid above said compensatory amount to non-resident in order to provide support services to the customers who use this software in their territory. Accordingly, the Assessing Officer took the view that the assessee has made payment for the purpose of providing technical services to the customers and accordingly held that the assessee should have deducted tax at source on the above said payment of ₹ 183.73 lakhs and in the absence of tax deduction at source, the Assessing Officer disallowed the same u/s. 40(a)(ia) of the Act, learned DRP also confirmed the same. The Ld DRP also confirmed the same.

11. The Learned AR submitted that the assessee has not availed any technical services from these foreign companies. The above said payment was made to the foreign companies as compensatory payment as per the agreement entered into between the assessee and its parent company. This compensatory payment constitutes business receipts in the hands of the recipient and hence they are not liable for taxation in India, as those foreign companies do not have permanent establishment in India. Accordingly, the learned AR submitted that the assessee was not liable to deduct tax at source from the above said payment and hence disallowance u/s. 40(a) is liable to be deleted. He further submitted that the DTAA entered between India and Portugal as well as between India and USA contain "make available" clause and these payments fail to satisfy those clause. The Ld A.R submitted that the foreign companies cited above, have provided only support services to the customers and they do not make available any technical knowhow. Accordingly the learned AR

submitted that on this ground also, the view taken by the Assessing Officer is liable to be rejected.

12. On the contrary, learned DR submitted that this issue may be set aside to the file of the Assessing Officer, since various contentions raised by the assessee were not examined by the Assessing Officer.

13. Having heard the rival submissions, we find merit in the contentions of the assessee. The assessee has made impugned payment to the foreign companies in the form of “compensatory payment” as per agreement entered by its parent company. Since the assessee has supplied software products beyond its territory, the business and profits of the foreign companies would get affected. In order to compensate the loss in business, the agreement provides for payment of compensation. Hence, in our view, the impugned payment shall constitute business receipts in the hands of the recipient companies, as it is in the nature of compensation received for loss of business/profit. Since, the above said foreign companies do not have permanent establishment in India, impugned payments are not liable for taxation in their hands in India, in which case, the assessee is not liable to deduct tax at source u/s. 195 of the Act.

14. We noticed that the tax authorities have placed reliance on the report given by the tax auditor whereas Form No.15CA & 15CB furnished by the assessee in terms of section 195(6) of the Act clearly specifies nature of payment as business receipts. In our view the declaration given in Form No. 15CA & 15CB, being specific forms for reporting the nature of payments, should be preferred to that of comment given in tax audit report. In any case, the AO has accepted Form No.15CA and Form No.15CB filed by the assessee without pointing out any defects. Even otherwise, we have examined the nature of payment and have concluded that the said payments constitute business receipts in the hands of recipient companies.

15. In view of the foregoing discussion, we set aside the order passed by the Assessing Officer on this issue and direct him to delete the impugned disallowance made in AY 2012-13.

16. In the result, both the appeals filed by the assessee are treated as allowed.

Order has been pronounced in the Court on 22.5.2018.

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 22/5/2018

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Senior Private Secretary)
ITAT, Mumbai

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