

आयकर अपीलिय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.352/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

Deputy Commissioner of Income Tax,
Circle – 14, Pune

.....अपीलार्थी / Appellant

बनाम / V/s.

Magna Steyr India P. Ltd.,
1st Floor, Kapil Zenith,
Survey No. 65, Hissa No. 1,
Bavdhan, Pune – 411021

PAN : AAFCS3693H

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.468/PUN/2016

निर्धारण वर्ष / Assessment Year : 2011-12

Magna Steyr India Private Limited,
1st Floor, Kapil Zenith,
Sr. No. 55, Hissa No. 1,
Bavdhan Khurd,
Pune – 411021

PAN : AAFCS3693H

.....अपीलार्थी / Appellant

बनाम / V/s.

Assistant Commissioner of Income Tax,
Circle – 14, Pune

.....प्रत्यर्थी / Respondent

Assessee by : S/Shri Vispi Patel & Suresh Dhoot
Revenue by : Shri Rajeev Kumar

सुनवाई की तारीख / Date of Hearing : 09-10-2018

घोषणा की तारीख / Date of Pronouncement : 12-10-2018

आदेश / ORDER**PER VIKAS AWASTHY, JM :**

These cross appeals by the Department and the assessee are directed against the assessment order dated 28-01-2016 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

2. The Department in appeal has assailed the assessment order by raising following grounds :

- “01. Whether the Hon'ble Dispute Resolution Panel was right in law and on facts and in circumstances of the case in directing to grant proportionate adjustments since entire transfer pricing exercise is carried out on the basis of the entity level net margin, considering different margin of the international transaction on the basis of segmental accounts at the later stage would make the entire proceedings carried out infructuous.
02. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal during the course of appellate proceedings before the Hon'ble Tribunal.”

3. The assessee has impugned the assessment order on following grounds :

“The appellant objects to the order passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (Act) by the learned Dy. Commissioner of Income-tax, Circle-14, Pune (Assessing Officer or AO) in pursuance of the directions issued under section 144C(5) of the Act by the learned Dispute Resolution Panel (DRP), on the following amongst other grounds:

On the facts and in circumstances of the case and in law:

1. *The AO in pursuance of the directions given by the DRP erred in determining the income of the appellant at INR 4,63,77,290 as against the returned income of INR 61,99,934.*

Reference to Transfer Pricing Officer

2. *The transfer pricing proceedings initiated by the AO under section 92CA(1) of the Act, are without any jurisdiction and ought to be quashed.*

Addition on account of Transfer Pricing Adjustments

3. *The AO in pursuance of the directions given by the DRP erred in confirming the addition of INR 2,25,23,332 being upward adjustment*

made by the learned Transfer Pricing Officer (TPO) while determining the arm's length price in respect of the appellant's international transactions; with regard to provision of engineering design services.

4. *The AO/DRP/TPO erred in rejecting CUP as the most appropriate method (MAM) to determine the arm's length price of the international transactions pertaining to provision of engineering design services to its AE without giving cogent reasons and complying with the provisions of the section 92C(3) of the Act.*
5. *The AO/DRP/TPO erred in rejecting the internal TNMM analysis conducted by the appellant on the basis of audited segmental accounts for benchmarking the international transactions, without giving cogent reasons.*
6. *The AO/DRP/TPO erred in not considering the appellant's claim for deduction of extra-ordinary cost/non-operating expenses like under-utilization of manpower capacity and infrastructure capacity, etc., while computing the operating margin of the appellant.*
7. *The AO/DRP/TPO erred in rejecting the audited segmental accounts submitted by the appellant for computing the operating margin of the appellant in relation to its transactions with its AEs.*
8. *The AO/DRP/TPO erred in rejecting the external TNMM analysis conducted by the appellant for benchmarking the international transaction of provision of engineering designing services to its AEs on an arbitrary basis, without giving cogent reasons.*
9. *The AO/DRP/TPO erred in determining the arm's length price of the international transactions by applying Transactional Net Margin Method (TNMM) as MAM, by selecting external comparable companies.*
10. *While applying external TNMM, the AO/DRP/TPO erred in the following:*
 - a. *Did not disclose the search process (if any) carried out in this regard;*
 - b. *Rejected the scientific search process carried out by the appellant, without providing any cogent reason;*
 - c. *Selected the companies which are not comparable to the appellant as per provisions of Rule 108(1), (2) and (3) of the Income-tax Rules, 1962 (Rules) r.w. section 92C of Act;*
11. *The AO/DRP/TPO erred in selecting Accentia Technologies Ltd. which is not functionally comparable to the assessee.*
12. *The AO/DRP/TPO erred in the following:*
 - a. *In incorrectly calculating the operating margin of Informed Technologies India Ltd. at 12.06% instead of 9.59%;*
 - b. *In not selecting Harita Techserv Limited as a comparable company, which is functionally comparable and selected by the assessee through due search process stated above.*
13. *The AO/DRP/TPO erred in not granting the relief as provided In the second proviso to section 92C(2) of the Act.*

Addition on account of other tax issues

14. *The AO erred in not following the directions of the DRP and excluding the amount of INR 357,169 from the total taxable income of the assessee, which relates to the reversal of excess provision for interest on service tax disallowed in AY 2010-11.*
15. *The AO erred in initiating penalty proceedings under section 274 r.w. section 271(1)(c) of the Act.*

Each one of the above grounds of appeal is independent and without prejudice to other. The appellant reserves the right to add, alter or amend to the above grounds of appeal.”

4. Shri Vispi Patel with Shri Suresh Dhoot appearing on behalf of the assessee submitted at the outset that the grounds raised by the assessee in appeal are identical to the grounds raised in assessment year 2010-11 in ITA No. 517/PUN/2015. The Co-ordinate Bench of the Tribunal vide order dated 08-08-2018 has adjudicated the appeal of assessee for assessment year 2010-11.

4.1 The ld. AR submitted that in the present appeal, the assessee is not pressing ground Nos. 1 and 2. In ground Nos. 3 to 7 the assessee has assailed the action of authorities below in rejecting CUP/internal Transactional Net Margin Method (TNMM) as the most appropriate method for determining arm's length price of the international transactions. The ground Nos. 8 to 13 are in support of the main grounds raised in ground Nos. 3 to 7. In ground No. 14 the assessee is seeking directions to the TPO to comply with the directions of DRP. The ld. AR submitted that there has been no change in the facts and the issues in assessment year under appeal are identical to the issues raised in assessment year 2010-11.

4.2 In respect of appeal filed by the Department the ld. AR submitted that the Revenue has assailed in allowing proportionate adjustments at entity level. The issue raised by the Revenue is squarely covered by the decision of Pune Bench of the Tribunal in the case of WIKA Instruments

India Pvt. Ltd. Vs. Dy. Commissioner of Income Tax in ITA No. 760/PUN/2015 for assessment year 2010-11 decided on 25-04-2018 and the decision of Hon'ble Bombay High Court in the case of Commissioner of Income Tax Vs. ALSTOM Projects India Limited in Income Tax Appeal No. 362 of 2014 decided on 14-09-2016.

5. Shri Rajeev Kumar representing the Department fairly admitted that the issues raised by the assessee in its appeal are similar to the issue already adjudicated by the Tribunal in assessee's appeal for assessment year 2010-11 and the facts in the assessment year 2011-12 are similar to the facts in assessment year 2010-11.

5.1 In respect of the ground raised by the Revenue, the ld. DR vehemently supported the findings of TPO and prayed for setting aside the findings of DRP/Assessing Officer on the issue.

6. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. We will first take up the appeal of Revenue for adjudication. The solitary ground raised by the Revenue in its appeal is against grant of proportionate adjustment at entity level. A perusal of the orders of authorities below show that the assessee had asked for adjustment only on the AE sales as disclosed in segmental accounts. The assessee in the immediately preceding assessment year 2010-11 had computed adjustment on same lines. The DRP accepted the same. In the assessment year under appeal the adjustment is sought at entity level and there has been no change in the facts. The DRP directed the TPO to make adjustment only on AE sales as was made in the preceding assessment year. The assessee in order to fortify his submissions with respect to allowability of adjustment at entity

level has placed reliance on the decision of Co-ordinate Bench of the Tribunal in the case of WIKA Instruments India Pvt. Ltd. Vs. Dy. Commissioner of Income Tax (supra). We find that the Co-ordinate Bench of Tribunal allowed TP adjustment at entity level by holding as under :

“28. The issue raised in ground of appeal No.6 raised by the assessee is against transfer pricing adjustment made on entity level.

29. The plea of assessee before us is that the issue has been settled by the Hon’ble Bombay High Court in CIT Vs. Thyssen Krupp Industries India P. Ltd. (2016) 381 ITR 413 (Bom), wherein the transfer pricing adjustment, if any, has to be made vis-à-vis associated enterprises transactions and not on entity level. The learned Authorized Representative for the assessee referred to the order of TPO and pointed out that transactions with associated enterprises were to the tune of ₹ 16.04 crores, whereas the Assessing Officer had taken the entire turnover of ₹ 58.85 crores as basis for working out transfer pricing adjustment. We find this issue is squarely covered by the ratio laid down by Hon’ble Bombay High Court in CIT Vs. Thyssen Krupp Industries India P. Ltd. (supra), wherein it has been held that adjustment, if any, on account of transfer pricing provisions is to be made to the associated enterprises segment only and not on entity level. Accordingly, we direct the Assessing Officer / TPO to re-compute the arm's length price of international transactions of assessee with its associated enterprises on the basis of transactions with associated enterprises only and not on entity level. The ground of appeal No.6 raised by the assessee is thus, allowed.”

7. We further find that the Hon’ble Jurisdictional High Court in the case of Commissioner of Income Tax Vs. ALSTOM Projects India Limited (supra) has also considered the issue of applying transfer pricing adjustment at entity level in the absence of actual segmental accounts and has held as under :

“10. We may once more note that the Income Tax Department within the jurisdiction of this Court must adopt a consistent view on issues of law. In this case, we find that the Revenue urges the absence of segmental accounts would warrant entity wise adjustment, when the Revenue had itself in Pedro Araldite Pvt. Ltd. (Supra) did not canvas the point, as even according to it the issue stood covered by the earlier orders of this Court in favour of the Assessee. The Revenue must apply the law equally to all and cannot take inconsistent position in law (de hors the facts) to apply different standards to different assessee. The administration of the tax laws should not degenerate into an arbitrary and inconsistent application of law dependent upon the Assessee concerned.

11. We also note that the Delhi High Court in Commissioner of Income Tax Vs. Keihin Panalfa Ltd. (ITA No.11 of 2015) (381 ITR 407) decided on

9th September, 2015 has while dealing with transfer pricing adjustment in the absence of segmental accounts held that adjustments have to be restricted only to transactions with Associated Enterprises. It further held that where separate accounts are not available, then proportionate adjustments to be made only in respect of the international transactions with Associated Enterprises.

12. *We are in respectful agreement with the view of the Delhi High Court in Keihin Panalfa Ltd 381 ITR 407. One must not lose sight of the fact that the transfer pricing adjustment is done under Chapter X of the Act. The mandate therein is only to redetermine the consideration received or given to arrive at income arising from for International Transactions with Associated Enterprises. This is particularly so as in respect of transaction with non Associated Enterprises, Chapter X of the Act is not triggered to make adjustment to considerations received or paid unless they are Specified Domestic Transactions. The transaction with non Associated Enterprises are presumed to be at arms length as there is no relationship which is likely to influence the price. If the contention of the Revenue is accepted, it would lead to artificial increase in the profits of transactions entered into with non Associated Enterprises by applying the margin at entity level which is not the object of Chapter X of the Act. Absence of segmental accounting is not an insurmountable issue, as proportionate basis could be adopted as done by the Delhi High Court in Keihin Panalfa Ltd. (supra)."*

8. Thus, in view of the facts of the case and the decision of Hon'ble Jurisdictional High Court, the appeal of Revenue is dismissed being devoid of any merit.

9. Now, we proceed to decide the appeal of assessee. The ground Nos. 1 and 2 of the appeal are dismissed as not pressed.

10. We find that ground Nos. 4 and 5 are identical to the ground Nos. 4 to 6 raised in appeal for assessment year 2010-11. It is an admitted position that the facts in assessment year under appeal are similar to the facts in assessment year 2010-11. The Tribunal decided the ground Nos. 3 to 11 in assessment year 2010-11 holding as under :

"7. Both the sides have admitted that the main issue raised in the present appeal is the most appropriate method to be applied for determining Arm's Length Price (ALP) of international transactions in respect of provision for engineering design and services. We find that identical grounds were

raised before the Tribunal by the assessee in assessment year 2009-10 in ITA No. 314/PUN/2014 (supra). The Tribunal decided the issue by observing as under :

“14. Now, coming to instant appeal before us also, the learned Authorized Representative for the assessee was specifically asked as to what is the method applied in assessment year 2008-09 by the Assessing Officer / TPO after the matter was set aside to them vide order dated 14.12.2015. The learned Authorized Representative for the assessee pointed out that no appeal effect has been given and the matter was pending. He then, stressed before us that in the year under appeal, the benchmarking is being done by applying man-hour rates which has been worked out as per revised form number. The man-hour rates worked out at 24 Euros which has been claimed in the revised form No.3CEB filed during the course of TP proceedings. It may be noted that the assessee in the year under consideration also, has been changing its stand i.e. in TP study report, TNMM method was selected. However, before the TPO, the assessee pleaded that internal CUP method was the most appropriate method, wherein hourly rates charged to associated enterprises at 24 Euros be applied as against charges levied on non-associated enterprise charges. The TPO on the other hand, had applied TNMM method and had made comparison with external comparables in order to benchmark international transactions of the assessee. We are of the view that in order to benchmark international transactions undertaken by the assessee, the most appropriate method needs to be applied. The question is which is the most appropriate method? The assessee had selected TNMM method and then by way of revised form No.3CEB during TP proceedings has changed its stand to apply internal CUP of man hourly rates. In order to benchmark international transactions undertaken by the assessee, an endeavour should be made to apply the most appropriate method and the same may be what has been applied by the assessee in TP study report or as proposed in TP proceedings. The stand of assessee that it is providing services to its associated enterprises and charging hourly rates, which worked out to 24 Euros per hour as against charges raised against non-associated enterprises and domestic parties. The assessee is providing specialized services in the field of engineering design services and where similar services are being provided to the domestic and non-associated enterprises parties, the question which arises is can the same be compared especially where the costs are from the same source and hence, the transactions are tainted.

15. We have already taken a view in the case of DCIT Vs. Man Trucks India Pvt. Ltd. in ITA No.547/PUN/2014 and in appeal filed by assessee in ITA No.582/PUN/2014, relating to assessment year 2009-10, order dated 03.04.2018, where the costs are identical for providing services, then even if the costs borne for associated enterprises and non-associated enterprises or the domestic parties are same, the same can be ignored in order to benchmark arm's length price of international transactions undertaken by the assessee. Accordingly, we find merit in the plea of assessee that hourly rates charged by it in providing specialized services to its associated enterprises can be the basis for verifying its stand as to whether the services provided by the assessee to its associated enterprises were at arm's length. However, the stand of Assessing Officer / TPO in rejecting the said plea of assessee was the tainted transactions vis-à-vis costs incurred by the assessee both for associated enterprises and non-associated enterprises. In the totality of the above said facts and circumstances, where the stand of assessee has not been looked into by the TPO and has been brushed aside, we in the interest of justice, direct the Assessing Officer / TPO to determine arm's length price of international transactions undertaken by the assessee by applying most appropriate method i.e. internal TNMM method of man hourly rates. The assessee has also asked for various other adjustments for carving out

differences which may also be looked into by the TPO, who shall decide the issue after affording reasonable opportunity of hearing to the assessee and determine arm's length price of international transactions.”

8. *Since, both the sides are unanimous in stating that the facts and the international transactions in the assessment year under appeal are identical to assessment year 2009-10, we deem it appropriate to remit this issue back to the file of TPO/Assessing Officer to decide the issue raised in ground Nos. 4, 5 and 6 in line with the above order of the Tribunal for assessment year 2009-10. Accordingly, ground Nos. 3 to 11 raised in the appeal are allowed for statistical purpose in the terms aforesaid.”*

11. Thus, in view of the fact that there has been no change in the nature of transactions and the facts are identical, respectfully, following the order of Co-ordinate Bench we admit the ground Nos. 4 and 5 raised in the appeal back to the file of TPO/Assessing Officer for de-novo adjudication on similar terms. The ground Nos. 3, 6 to 13 are consequential and are in support of ground Nos. 4 and 5. Accordingly, the above said grounds are also restored to the file of TPO/Assessing Officer and hence, are allowed for statistical purpose.

12. In ground No. 14 the assessee has prayed for directions to the TPO for complying with the directions of DRP. We find that the DRP while adjudicating the issue relating to excess provision for interest on service tax amounting to Rs.3,57,169/- has held as under :

“7.4 It is seen from the order of AO/DRP for AY 2010-11, that the amount of Rs.3,57,169 was disallowed. Hence, the same amount cannot be brought to tax again in AY 2011-12. Accordingly, the AO is directed to verify the record and give relief to the assessee.”

The Assessing Officer is directed to comply with the directions of DRP. Accordingly, ground No. 14 is allowed for statistical purpose.

13. In ground No. 15 the assessee has assailed initiation of penalty proceedings u/s. 271(1)(c) of the Act. The ground raised by the assessee is pre-mature at this stage. Hence, the same is dismissed as such.

14. In the result, the appeal of assessee is partly allowed for statistical purpose.

15. To sum up, the appeal of Revenue is dismissed and the appeal of assessee is partly allowed for statistical purpose.

Order pronounced on Friday, the 12th day of October, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 12th October, 2018

RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Dispute Resolution Panel-3, Mumbai
4. The DIT(IT/TP), Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune