

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

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA Nos.172 & 3080/PUN/2017
निर्धारण वर्ष / Assessment Years : 2012-13 & 2013-14

M/s. Sandvik Asia Pvt. Ltd.,
Mumbai-Pune Road,
Dapodi,
Pune – 411012
PAN: AACCS6638K

.... अपीलार्थी/Appellant

Vs.

The Asst. Commissioner of Income Tax,
Circle-10, Pune

.... प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak
Revenue by : Shri S.B. Prasad, CIT

सुनवाई की तारीख / Date of Hearing : 27.03.2019	घोषणा की तारीख / Date of Pronouncement: 03.05.2019
--	--

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

Both the appeals filed by assessee are against separate orders of ACIT, Circle-10, Pune, dated 28.11.2016 and 27.11.2017 relating to assessment years 2012-13 and 2013-14 passed under section 143(3) r.w.s. 144C(13) of the Income-tax Act, 1961 (in short 'the Act').

2. Both the appeals relating to same assessee on similar issue were heard together and are being disposed of by this consolidated order for the sake of convenience.

3. The assessee in ITA No.172/PUN/2017, relating to assessment year 2012-13 has raised the following grounds of appeal:-

1. Ground 1:

On the facts and in the circumstances of the case and in law, the Hon'ble DRP / Ld. AO / Ld. TPO have erred in proposing to enhance the income of the assessee by Rs.33,86,30,016 by holding that the arm's length value of international transaction pertaining to payment of Management Service Fee ('MSF') and Regional Management Fee ('RMSF') to be 'Nil'. While doing so, the Hon'ble DRP / Ld. AO / Ld. TPO have erred:

- *in rejecting the benchmarking analysis conducted by the Appellant by considering the Associated Enterprises ('AEs') as the tested party under Transactional Net Margin Method ('TNMM') as the most appropriate method;*
- *in challenging the commercial business needs and decisions of the Appellant with respect to availing the services from AEs;*
- *in disregarding the documentary evidences submitted by the Appellant with respect to the compliance with benefit test and the basis of cost allocation;*
- *in determining arm's length price of said international transaction as 'Nil' without undertaking any analysis for selection of most appropriate method and search for comparable uncontrolled transaction to compute arm's length price, as prescribed by Indian Transfer Pricing Regulations, thereby violating the provisions of Section 92C(3) of the Act.*

It is prayed that the transfer pricing addition of Rs.33,86,30,016 be deleted.

2. Ground 2:

On the facts and circumstances of the case, and in law, the Hon'ble DRP erred in confirming the disallowance under section 40(a)(i) of the Income Tax Act, 1961 ("the Act") of IT support service payments made to Sandvik Machining Solutions AB of Rs.57,39,119 and not considering the Appellants submission that it has actually deducted the tax at source on the said payment.

It is prayed that the addition under section 40(a)(i) of the Act be deleted.

4. The assessee is aggrieved by the orders of authorities below against transfer pricing adjustment made in its hands in respect of international transactions pertaining to payment of Management Services Fees and Regional Management Fees at Nil and thereby enhancing income by ₹ 33,86,30,016/-. The second issue raised in both the appeals is against disallowance of payment made to Sandvik Machining Solutions AB of

₹ 57,39,119/- on the ground that tax at source has not been deducted. The assessee is aggrieved by the order of Assessing Officer in not taking note of the fact that the assessee had actually deducted tax at source out of such payments.

5. The learned Authorized Representative for the assessee at the outset pointed out that the issue raised in the present appeal stands covered by the orders of Tribunal relating to different years in the case of assessee.

6. The learned Departmental Representative for the Revenue placed reliance on the orders of authorities below.

7. We have heard the rival contentions and perused the record. We find that the issue of transfer pricing adjustment on account of Management Service Fees has been raised and decided in favour of assessee. The learned Authorized Representative for the assessee pointed out that the lead year in which addition was made was assessment year 2005-06. However, in assessment years 2006-07 to 2008-09, the transaction was accepted to be at arm's length price. Further in assessment years 2009-10 and 2010-11, transfer pricing adjustment was made by taking the value of transaction at Nil. Similar was the position in assessment year 2011-12. The learned Authorized Representative for the assessee pointed out that appeals relating to the aforesaid years have been decided in favour of assessee by the Tribunal by separate orders. Our attention was drawn to latest order relating to assessment year 2011-12. The learned Authorized Representative for the assessee stressed that the same ground of appeal in respect of transfer pricing adjustment was raised and the Tribunal vide paras 7 to 14 has dealt with the

said issue and has held that where the case of Assessing Officer/TPO/DRP was not that services have not been provided by Sandvik AB, Sweden and also not that any tangible benefits were derived by the assessee from such services. Reference was made to evidences filed by assessee in the form of e-mails, on the basis of which the Tribunal in earlier year had come to a finding that services were provided by Sandvik group entities in accordance with terms of agreement and were actually rendered by associated enterprises. The services were being rendered by group companies other than Sandvik AB, which were not in the field of managerial but were technical in nature, the Tribunal in such scenario held that there was no merit in making any addition in the hands of assessee on account of transfer pricing adjustment on the aforesaid transaction of payment of managerial services to Sandvik AB and Sandvik Middle East FZE, UAE.

8. Now, coming to the facts of present case, wherein though the assessee has made payments for availment of management services to Sandvik AB as in earlier years but the TPO in the present case has noted that the services were rendered by two entities and he goes on to benefit test. The assessee had furnished sample invoices before the TPO, whereas the case of DRP was that the assessee has not furnished evidences of second concern i.e. Sandvik Middle East FZE, UAE. The learned Authorized Representative for the assessee has pointed out that all these evidences were submitted before the authorities below which were not entertained. Our attention was drawn to page 34 onwards of Paper Book. It was also pointed out that in assessment year 2011-12, services were rendered by same parties as in the present assessment year and there was no dispute regarding rendering of services. We find merit in the plea of assessee in this regard.

9. The Tribunal in assessee's own case in ITA No.491/PUN/2016 and cross appeal in ITA No.533/PUN/2016, vide order dated 08.03.2019 has considered the factual aspects of the case in para 7 onwards and has also referred to the treatment of TPO in treating the arm's length price of management services fees at Nil. Further, vide para 9, the Tribunal has taken note of the receipt of management services from two concerns i.e. Sandvik AB and Sandvik Middle East FZE, UAE. The case of Revenue was that e-mails show that these were not receipts from Sandvik AB, Sandvik Middle East FZE, UAE and from other group companies. The case of assessee was that these payments were being made since 2002 to Sandvik AB and from assessment year 2005-06 to Sandvik Middle East FZE, UAE. The payment of management service fees were benchmarked at Nil on the ground that services were rendered by different entities of Sandvik group. The Tribunal after taking note of the pleadings of assessee had held that where as per the terms of agreement between the assessee and Sandvik AB, it is provided that the payment of management service fees would be to Sandvik AB on account of services which may be rendered by various group concerns of Sandvik group and also then arm's length price of such transaction cannot be taken at Nil, since the assessee has proved the rendering of management services by associated enterprises, for which the payment has been made by the assessee. The Tribunal did not accept the benefit test applied by the Assessing Officer as not relevant and allowed the claim of assessee on the ground that where the services have been actually rendered though by group concern of Sandvik group, then the payment made to Sandvik AB and Sandvik Middle East FZE, UAE cannot be taken at Nil and had held that no addition is warranted in the hands of assessee on account of such transfer pricing adjustment. Following the same parity of reasoning and strongly relying on the

order of Tribunal in assessment year 2011-12 in paras 7 to 14, we find no merit in the orders of authorities below in the present case also and we reverse the same and hold that no addition is warranted in the hands of assessee on account of transfer pricing adjustment on the aforesaid transaction of payment of managerial services to Sandvik AB and Sandvik Middle East FZE, UAE. The ground of appeal No.1 raised by assessee is thus, allowed.

10. Now, coming to ground of appeal No.2 raised by assessee. Brief facts relating to the issue are that the assessee had made payments to its associated enterprise Sandvik Machining Solutions Sverige AB (previously known as Sandvik Tooling Sverige AB) of ₹ 57,39,119/-. The explanation of assessee was that the said payment was made for limited access to systems such as GSS, PSS and related softwares, applications and related software (costing, production and marketing related) services to tooling division. The Assessing Officer was of the view that the said amount was taxable in the hands of assessee being royalty both under the provisions of Income Tax Act and Article 12 of DTAA. The case of assessee that the payments were for use of copyrighted article and not the copyright in the article, was not accepted by the Assessing Officer and in view of retrospective amendment to section 9(1)(vi) of the Act, under which Explanations 4 to 6 were added, it was held that the said expenditure was disallowable in the hands of assessee for non deduction of tax at source under section 40(a)(i) of the Act. The learned Authorized Representative for the assessee pointed out that the issue of making payment to Sandvik Machining Solutions Sverige AB arose in earlier year and the DRP allowed the claim of assessee. The Tribunal while deciding the appeal of Revenue considered the ground of appeal No.4 raised by Revenue. In this regard vide para 23 onwards and in turn, relying on the ratio

laid down by Pune Bench of Tribunal in Allianz SE Vs ADIT reported in 51 SOT 399 (Pune – Trib.) allowed the claim of assessee. Reference was also made to the decision on similar issue in John Deere India Pvt. Ltd. Vs. DDIT (IT) (2019) 70 ITR (Trib) 73 (Pune).

11. We find that the issue of payment for access to application software has also been considered at length by the Tribunal in John Deere India Pvt. Ltd. Vs. DDIT (IT) (supra) and it has been held that in view of the definition of 'royalty' not being amended under DTAA, there is no question of treating the said payment as 'royalty' in the hands of assessee. Vis-a-vis application of provision of section 9(1)(vi) of the Act, it was held that since DTAA provisions being more beneficial, override the same, are not to be applied. Following the same parity of reasoning, we hold that the aforesaid payment to Sandvik Machining Solutions Sverige AB does not attract the tax deduction at source and for such non deduction of tax at source, payment cannot be disallowed in the hands of assessee. Accordingly, direction is given to allow the claim of assessee. The grounds of appeal raised by assessee are thus, allowed.

12. Now, coming to appeal of assessee in assessment year 2013-14. The learned Authorized Representative for the assessee pointed out that ground of appeal No.1 raised by assessee is against transfer pricing adjustment made by taking arm's length value of international transactions pertaining to payment of management service fees at Nil. It was also pointed out that during the year the management service fees paid to Sandvik AB was ₹ 36.37 crores as against total payment of ₹ 40.27 crores. He further stated that remaining ₹ 3.89 crores was paid to four different associates enterprises by the assessee. Referring to the order of TPO, he pointed out that arm's length price of

transactions pertaining to management service fees was treated as Nil and adjustment of ₹ 36,37,92,788/- was made in the hands of assessee. However, the DRP has enhanced the said adjustment to ₹ 40.27 crores on the ground that no benefit arises to the assessee. The learned Authorized Representative for the assessee pointed out that the issue of payment of management services to Sandvik AB stands squarely covered by the order of Tribunal and in respect of balance payment of ₹ 3.89 crores to different parties, the assessee had filed sample invoices before the DRP. However, the same have not been appreciated by the DRP.

13. On perusal of record, we find that during the year, the assessee had paid management service fees to Sandvik AB of ₹ 36.37 crores. This payment to Sandvik AB stands squarely covered by the order of Tribunal and as referred by us in the paras hereinabove while deciding the appeal relating to assessment year 2012-13.

14. Now, coming to balance payment of ₹ 3.89 crores, the TPO though had made no such adjustment, but the DRP was of the view that Regional Management Services fees of ₹ 1.87 crores and operational service fees of ₹ 2.01 crores has been paid by assessee, which also needs to be taken at Nil, in the absence of any evidence being filed relating to availing of such services. The findings of DRP were vis-a-vis benefit accruing to the assessee, we have in series of decisions held that the Revenue authorities cannot sit in the judgment of decision of businessman to avail services and consequently the benefit test is not to be satisfied by the assessee. The DRP refers to the evidences filed in Annexure 4B in respect of operational services and goes on to comment that the said evidences does not establish that the assessee has in

any way benefited by e-mails or services rendered to it. Similarly, regarding Regional Management Services, copies of few e-mails filed were perused by the DRP and they were of the view that these were routine communications and it does not establish the benefits accruing to the assessee. Therefore, services were considered at Nil and the income was enhanced in the hands of assessee by ₹ 3.89 crores. We find no merit in the order of DRP in making the aforesaid enhanced addition in the hands of assessee. The onus is upon assessee to establish that it had availed services but it is not onus upon the assessee to fulfil the benefit test, if any. Since it is not in dispute that services have been availed by the assessee, then authorities below cannot sit in judgment and take the said transaction of payment of Management Service Fees at Nil in the hands of assessee. We have already deliberated upon the aforesaid issue in respect of Management Service Fees paid to Sandvik AB and applying the same parity of reasoning, we hold that in respect of balance payment of ₹ 3.89 crores, no transfer pricing adjustment is to be made in the hands of assessee. The ground of appeal No.1 raised by assessee is thus, allowed.

15. Now, coming to ground of appeal No.2 raised by assessee, wherein it has been pointed out that the assessee was due to make certain TDS payments in assessment year 2009-10, which were not paid and hence, disallowance under section 40(a)(i) of the Act. However, TDS was paid in assessment year 2013-14 and hence, the assessee asked for adjustment, but the order of Assessing Officer has been quashed in assessment year 2009-10 and hence, there is no disallowance. Hence, the issue in present appeal becomes academic, in view of concession of the learned Authorized

Representative for the assessee. The ground of appeal No.2 is disposed of as indicated above. The grounds of appeal raised by assessee are thus, allowed.

16. In the result, both the appeals of assessee are allowed.

Order pronounced on this 3rd day of May, 2019.

Sd/-
(ANIL CHATURVEDI)
लेखा सदस्य / **ACCOUNTANT MEMBER**

Sd/-
(SUSHMA CHOWLA)
न्यायिक सदस्य / **JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 3rd May, 2019.

GCVSR

आदेश की प्रतिलिपि अग्रहित/Copy of the Order is forwarded to :

1. The Appellant;
2. The Respondent;
3. The DRP-3, Mumbai;
4. The CIT(IT&TP), Pune;
5. The DR 'A', ITAT, Pune;
6. Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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