IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: 'I-1', NEW DELHI

BEFORE SHRI G.D.AGRAWAL, VICE PRESIDENT AND
SMT. BEENA A PILLAI, JUDICIAL MEMBER

ITA No. 5939/Del/2017
AY: 2013-14

M/s Atotech India Pvt.Ltd. 66 KM Stone, NH 8 Delhi Jaipur Highway VIII-Sidhrawali Gurgaon PAN: AACCM0338G	**vs**.	DyCIT, Circle 1(1) Gurgaon
(Appellant)		**(Respondent)**

Assessee by : Shri K.M.Gupta, Adv.

Department by : Sh. Sanjay I Bara, CIT, D.R.

Date of Hearing : 18/03/20198

Date of Pronouncement: 31/05/2019

ORDER

PER BEENA A PILLAI, JUDICIAL MEMBER

Present appeal has been filed by assessee against final assessment order dated 11/08/17 passed by Ld.DCIT, Circle I (1), Gurgaon for assessment year 2013-14 on following grounds of appeal:

"1. That on the facts and circumstances of the case and in law, the order passed by the Learned Assessing Officer ('AO') / Transfer Pricing Officer ('TPO') and upheld by the Hon'ble Dispute Resolution Panel ("DRP") is bad in law and erroneous.

2. That the Ld. AO pursuant to the directions of the Hon'ble DRP erred on facts and in law in making an addition of Rs 217,238,084/- to the income of the appellant on account of international transaction pertaining to payment of Research and Development ("R&D") and management cost sharing (after allowing network administration costs) undertaken by the Appellant.

3. The Ld. AO/TPO/DRP erred on facts and law in determining the arm's length price ('ALP') of the Appellant's international transactions pertaining to payment of Research and Development ("R&D") and management cost sharing (after allowing network administration costs) to its Associated Enterprise ('AE') as INR 22,160,608/- against the sum of INR 239,398,692/- incurred by the Appellant and thereby making an addition of INR 217,238,084 /- on that account to the Appellant's income and in doing so have grossly:

3.1 *erred in disregarding the ALP, as determined by the Appellant in the TP documentation maintained by it in terms of section 92D of the Income Tax Act, 1961 ("the Act") read with Rule 10D of the Income Tax Rules,1962 ("the Rules").*

3.2 *erred in holding that the transactions are covered under intra group services without appreciating that the payment made to Atotech Group was governed by a Cost Sharing Arrangement ("CSA") and not under an agreement for rendering intra-group services.*

3.3 *erred in adjudicating the ALP of the contributions made to the R&D and Technical Sales Services CSA as 'Nil' by ignoring the fact that the said contributions were accepted to be at arm's length by the*

Ld. TPO in the previous assessment year's namely AY 2007-08, AY 2008-09, AY 2009-10 & AY 2010-11;

3.4 *erred by holding that the Appellant has not furnished/ furnished only generic or out of audit period documentary evidence to demonstrate the benefits received from the activities under CSA;*

3.5 *erred in holding that the Assessee has neither identified payment for each activity received under CSA, nor has furnished any basis for the costs allocated to it, ignoring the report of the independent auditors documenting the quantum, manner and the methodology for computing the contribution to be made by each participating group entity;*

3.6 *erred by holding that the benefits received under the CSA are incidental and duplicative in nature which have not resulted in any economic and commercial benefit to the Appellant.*

3.7 *erred in holding that the benefits received by the Appellant are in the nature of shareholder services and no payment was warranted for the same.*

3.8 *erred in considering the ALP of the transaction to be INR 22,160,608/- (as against actual payment of INR 239,398,692/-) by inappropriate application of CUP method in contravention of the provision of Rule 10B of the Rules merely based on presumptions without furnishing details of price charged in any comparable uncontrolled transaction;*

3.9 *erred in holding that the Appellant has not been able to establish the need for the activities received from AEs based on the premises that no cost benefit analysis was undertaken with regard to*

cost of activities and benefit received from AEs vis-a-vis independent parties.

4. That the Ld. AO / Hon'ble DRP/ Ld. TPO erred on facts and in law in making an addition of INR 120,412/- to the income of the Appellant by imputing interest on outstanding inter-company receivables and in doing so have grossly erred in:

4.1 *directing an adjustment to be made with respect to outstanding receivables ignoring that the same was accepted to be at arm's length by the Ld. TPO and no adjustment to that effect was arising from draft AO order;*

4.2 *treating the outstanding receivables from AEs as a separate international transaction;*

4.3 *re-characterising the overdue amount on receivables from AEs as an unsecured interest-free loan;*

4.4 *imputing interest on the overdue receivables on the basis of the benchmarking carried out for the purposes of external commercial loans obtained by the Appellant;*

4.5 *ignoring the fact that the effect, if any, of outstanding inter-company receivables has to be considered by making a working capital adjustment;*

4.6 *ignoring that net payables outstanding in the books of Appellant were greater than net receivables from AE's and warranted no such adjustment.*

5. The Ld. AO/DRP/TPO erred in making various statements in their respective orders, based on conjectures, surmises, inferences and

presumptions which are not in accordance with facts of the case and is against legal principles.

6. That the Ld. AO/Hon'ble DRP/ Ld. TPO erred in disregarding judicial pronouncements in India in undertaking the TP adjustment;

7. The Ld. AO erred in initiating penalty proceedings under section 271(i)(c) of the Act for concealment and furnishing inaccurate particulars of income.

8 That the Ld. AO erred in proposing to levy interest under section 234B and 234C of the act.

That the above grounds and sub grounds of objections are without prejudice to each other.

The Appellant craves leave to alter, amend or withdraw all or any of the Grounds of objections herein or add any further grounds as may be considered necessary and to submit such statements, documents and papers as may be considered necessary either before or during the hearing."

2. Brief facts of the case are as under:

Assessee filed its return of income on 30/11/13 declaring total income of Rs.5,78,98,270/-. Case was selected for scrutiny and statutory notices under section 143 (2) of the Income Tax Act, 1961 (the Act) along with questionnaire and notice under section 142 (1) of the Act was issued. In response to statutory notices, representative of assessee appeared before Ld.AO and filed requisite details/information as called for.

2.1. Ld.AO observed that assessee has merged with M&T Harshaw a supplier of general metal finishing chemistry and

process for printed circuit board manufacturing and electroplating division of Schering AG, a manufacturer of printed circuit board chemistry, general metal finishing chemistry and equipment for the same. Thus assessee has been considered to be a leading electroplating chemicals and equipment supply company in the world with overall research and development, analytical and production capabilities for production of electroplating chemicals that serves numerous industries and markets.

2.2. Ld. AO observed that assessee had entered into international transaction with its AE during year and accordingly a reference was made to Ld. Transfer Pricing Officer (TPO). Ld.TPO upon receipt of reference, issued notice to assessee u/s 92C of the Act and directed assessee to file economic analysis of international transaction as per Rule 10 D. Ld.TPO observed that assessee has entered into following international transactions.:

Sl. No.	Description of the Transactions	Amount (In Rs.)
1.	Purchase of Raw Material and Components	188,627,033
2.	Sale of Product	27,381,366
3.	Purchase of Capital Goods	559,861
4.	Cost sharing expenses	239,398,692
5.	Interest on External Commercial Borrowings	2,600,505
6.	Cost Recharges paid/received	3,455,830
7.	Cost Recharge paid	1,121,928
8.	Cost Recharge received	1,442,487

2.3. Ld.TPO also observed that assessee has paid Rs.2,23,93,98,692/-towards cost-sharing expenses to its AE as under:

Sl. No.	Particulars	Amount – in Rs.
1.	- Research & Development	145,024,029
2.	- Management Group Cost (Global)	91,800,200
3.	- Management Group Cost (Regional)	2,574,463
	Total	239,398,692

2.4. Ld.TPO after considering submissions advanced by assessee proposed an adjustment of Rs.2,21,60,608/-as arm's length price of intra-group services by applying CUP method thereby proposing an upward adjustment of Rs.21,72,38,084/- towards the intra-group services (cost-sharing services) being difference between ALP determined by assessee and ALP determined by Ld. TPO.

3. Aggrieved by adjustment proposed by Ld.TPO, assessee preferred objections before DRP who upheld view proposed by Ld. TPO.

3.1. Upon receipt of directions of DRP, Ld.AO passed final assessment order by making following additions in hands of assessee:

Sl. No.	Nature of international transaction	ALP determined by the assessee (INR)	ALP determined by the TPO (INR)	Adjustments u/s 92CA (INR)
1.	Intra Group Services (Cost sharing services)	239,398,692	22,160,608	21,72,38,084
2.	Interest on receivables	NIL	1,20,412	1,20,412
	Total			21,73,58,496

4. Aggrieved by additions made by Ld. AO, assessee is in appeal before us now.

4.1. Ld.Counsel submitted that **Ground No. 1, 5-6** are general in nature and therefore do not require any adjudication.

5. Ground No. 2-3 is in respect of addition made by Ld.AO on account of research and development and management cost-sharing.

5.1. Ld.Counsel submitted that issue stands squarely covered by order of this Tribunal for *assessment year 2011-12* in assessee's own case vide *order dated 12/08/16 in ITA No. 6680/Del/2015*, wherein issue has been set aside back to Ld.AO/TPO to decide afresh based upon observations of *Hon'ble Delhi High Court* in case of *CIT vs Cushman and Wakefield* reported in *46 Taxmann.com 317*. Further for assessment years *2008-09, 2009-10 and 2012-13*, in assessee's own case vide *order dated 11/05/18 in ITA No. 3419 and 6571/del/2016 and 1112/del/2014*, issue has been set aside for determining whether this was a case of CCA as submitted by assessee or intra-group services.

5.2. Ld.CIT,DR placed reliance upon orders passed by authorities below.

6. We have perused submissions advanced by both sides in light of records placed before us.

6.1. This tribunal in subsequent order in assessee's own case for assessment years 2008-09, 2009-10 and 2012-13, vide order dated 11/05/18 in ITA No. 3419 and 6571/del/2016 and 1112/del/2014 has observed as under:

"4. We have heard the rival submissions and perused the relevant material on record. The authorities below have determined Nil ALP of the international transaction of 'Management group cost' on the ground that either no services were obtained or it was a case of duplication of services. Further, the authorities went on to apply the `benefit test' for determining the ALP of such services at nil.

5. The Hon'ble jurisdictional Punjab & Haryana High Court in Knorr-Bremse India P. Ltd. vs. ACIT (2016) 380 ITR 307 (P&H) has held that the question whether a transaction is at an arm's length price or not is not dependent on whether the transaction results in an increase in the assessee's profit. A view to the contrary would then raise a question as to the extent of profitability necessary for an assessee to establish that the transaction was at an arm's length price. A further question that may arise is whether the arm's length price is to be determined in proportion to the extent of profit. Thus, while profit may reflect upon the genuineness of an assessee's claim, it is not determinative of the same. It went on to hold that business decisions are at times good and profitable and at times bad and unprofitable. Business decisions may and, in fact, often do, result in a loss. The question whether the decision was commercially sound or not is not relevant. The only question is whether the transaction was entered into bona fide or not or whether it was sham and only for the purpose of diverting the profits.

6. Reverting to the facts of the extant case, it is found that the assessee has placed on record a list of services received under the international transaction of 'Management cost services', a copy of which is available on pages 18 to 21 of the paper book. Certain other details of technical materials received from the AEs during some of the workshops attended by the employees of the assessee, has also been placed on pages 94 to 650 of the paper book. Under these circumstances, it is difficult to approve the stand taken by the authorities that the assessee did not avail any services. We, therefore, hold that the assessee did receive some services and the applicability of `benefit test' cannot be countenanced in view of the

judgment of the Hon'ble jurisdictional High Court in the case of Knorr-Bremse India P. Ltd. (supra).

7. There is a further dispute as to whether the assessee made payment of Rs.4.55 crore under CCA or for intra-group services. Whereas, the assessee claimed it to be CCA, the ld. CIT(A) has held it to be intra-group services. In this regard, it is observed that the assessee entered into the agreement, pursuant to which such payment was made, in an earlier year and started making payment, inter alia, for 'Management group cost.' The TPO proposed transfer pricing adjustment in respect of such an international transaction in preceding and succeeding years as well. On the question as to whether the payment of `Management group cost' was under CCA or for intra-group services, the Tribunal, vide its order (in ITA No.6680/Del/2015) dated 12.08.2016 for the assessment year 2011-12, has restored the matter to the file of TPO for determining if it was a case of CCA or intra group services. Relevant discussion has been made in para 11 of the order, whereby it has been observed that: 'The ld. TPO is also required to examine the nature of services whether there is cost sharing arrangement or intra group services with respect to various agreement.' There is no adjudication on this issue by the Tribunal in its order for the A.Y. 2007-08. Since the matter has already been restored by the Tribunal for determining if it is a case of CCA or for intra-group services and the relevant Agreement continues to remain the same for the instant year as well, we are of the opinion that it would be just and fair if the impugned order holding payment of 'Management group cost' as intra-group services instead of CCA, is set aside and the matter is restored to the file of Assessing Officer/TPO for deciding it in conformity with the decision taken pursuant to the directions given by the Tribunal in the other year.

8. Coming to the most appropriate method, it is found that the assessee aggregated all the international transactions and applied the TNMM on entity level. On the other hand, the TPO came to hold that the CUP was required to be applied for determining the ALP of

the international transaction of `Management Group cost', which view was accorded imprimatur by the ld. CIT(A).

9. The Hon'ble jurisdictional High Court in Knorr Bremse India (P) Ltd. (supra) considered the question of aggregation of international transactions. Their Lordships held that several transactions between two or more AEs can form a single composite transaction if they are closely linked transactions and the onus is always on the assessee to establish that such transactions are part of an international transaction pursuant to an understanding between various members of a group. The Hon'ble High Court observed that in case of a package deal where each item is not separately valued but all are given a composite price, these are one international transaction. It went on to hold that where a number of transactions are priced differently but on the understanding that the pricing was dependent upon the assessee accepting all of them together (i.e. either take all or leave all), then it is also an international transaction. But it will be on the assessee to prove that although each is priced separately, but they are provided under one composite agreement. It still further held that each component may be priced differently also, but it will have to be shown that they are inextricably linked that one cannot survive without other. Merely because purchase of goods and acceptance of services lead to manufacture of final product, it does not follow that they are dependent transactions.

10. Adverting to the facts of the instant case, we find that the international transactions combined by the assessee for showing them at ALP cannot be aggregated as they do not satisfy the above criteria laid down by the Hon'ble jurisdictional High Court in Knorr Bremse India (P) Ltd. (supra). Firstly, there is no package deal and the international transaction in question is separately valued. Secondly, despite the fact that the international transactions are priced differently, there is nothing to show an understanding that the pricing was dependent upon the assessee accepting all of them together. Besides, the assessee has not shown any inextricable link between these transactions as one not surviving without the other.

We, therefore, uphold the view point of the TPO in rejecting the aggregation approach adopted by the assessee.

11. Having held that the international transactions of `Management Group cost ' should be separately benchmarked, the next crucial question is the determination of the most appropriate method. It is seen that the assessee applied the TNMM as the most appropriate method on an aggregate basis, which has been rejected by the TPO. Obviously, the TNMM applied by the assessee simply establishes the aggregate price paid for independent international transactions to be at ALP. Since the international transaction of `Management Group cost' has been held above to be separate, the determination of its ALP also needs to be done distinctly.

12. Insofar as the Tribunal orders in the case of the assessee on the applicability of the most appropriate method are concerned, we find that as against the assessee applying the TNMM, the TPO applied the CUP method for determining the ALP of the international transaction in the immediately preceding year. The Tribunal approved the CUP as the most appropriate method, but on the basis of a concession given by the assessee as has been recorded therein. The ld. AR did not give any concession for the applicability of the CUP as the most appropriate method for the year under consideration. We further find from the order of the Tribunal for the assessment year 2011-12 that there is no adjudication on the applicability of a particular method as most appropriate for determining the ALP of the international transaction.

13. By now, it is fairly settled through a catena of decisions that the CUP is the most appropriate method to determine the ALP of an international transaction because it seeks to compare the price charged or paid for property transferred or services rendered, provided proper comparables are available. It is under this method alone that the price charged or paid is directly compared with the price charged or paid in an uncontrolled comparable transaction. The remaining four specific methods seek to make comparison of the price charged or paid indirectly through the medium of normal profit

arising in a comparable uncontrolled transaction. Further, the CUP method is a transaction specific method which strives to determine the ALP of an international transaction on a micro level, thereby lending more credibility to the ALP of a transaction.

14. Considering the decision in Knorr-Bremse (supra) and the view taken by the Tribunal in assessee's own case as discussed above, we set aside the impugned order and remit the matter to the file of AO/TPO for a fresh determination of the ALP of the international transaction of `Management Group cost', primarily, under the CUP method. While applying the CUP method, it is always obligatory to bring on record some comparable uncontrolled instance as per the mandate of rule 10B(1)(a)(i). Not even a single comparable instance has been brought on record by the TPO in his order to facilitate comparison between the price paid by the assessee vis-à-vis that paid by other comparables in similar uncontrolled circumstances. It was on account of his having canvassed a view that either the services were not received by the assessee or were duplicate in nature. Such a view has been overturned by us in earlier paras. Under these circumstances, we are left with no option but to set aside the impugned order and remit the matter to the file of AO/TPO for a fresh determination of the ALP of the international transaction, primarily, under the CUP method. In case, the TPO finds that the CUP method cannot be applied either due to non-availability of the relevant data or for some other genuine reasons, he is free to apply any other appropriate method for a fresh determination of the ALP of the international transaction of `Management Group cost'. Needless to say, the assessee will be allowed a reasonable opportunity of hearing in such fresh proceedings."

6.2. Respectfully following the same, we also set aside this issue back to Ld.TPO/AO for fresh determination of the arm's length price of international transaction by applying CUP as most appropriate method. It is also directed that in case Ld.TPO finds that

identical/similar comparables are not available under CUP, then he is free to apply any other appropriate method for determination of arm's length price of international transaction of management group cost. Needless to say that assessee shall be allowed proper opportunity of being heard as per law.

6.3. Accordingly these grounds raised by assessee stands allowed for statistical purposes.

7. Ground No. 4 has been raised by assessee in respect of addition of Rs.1,20,412/- on account of imputing interest on outstanding receivables.

7.1. Ld.Counsel again submitted that issue stands squarely covered by order of this Tribunal for assessment year 2011-12 wherein this Tribunal (supra) has set aside this issue to Ld. AO/TPO for fresh examination.

7.2. On the contrary Ld. CIT DR placed reliance upon orders of authorities below.

8. We have perused submissions advanced by both sides in light of records placed before us.

8.1. It is observed that this Tribunal for assessment year 2011-12 has directed Ld.AO to adjudicate afresh considering agreed credit period allowable to Associated Enterprise by assessee.

8.2. Respectfully following same, we direct Ld. AO to adjudicate this issue afresh on basis of documents/evidences filed by assessee. Assessee is directed to file agreement under which payment has to be received from AE against services provided by assessee. Upon analysis of such agreement, assessee shall submit

evidences in respect of agreed allowable credit period for making payments by AE to assessee based upon which interest shall be computed.

8.3. Accordingly this ground raised by assessee stands allowed for statistical purposes.

9. Ground No.7 is premature at this stage and **Ground No. 8** is consequential accordingly do not require any adjudication.

10. In the result appeal filed by assessee stands allowed for statistical purposes.

Order pronounced in the open court on 31st May, 2019.

Sd/-	Sd/-
(G.D.AGRAWAL)	**(BEENA A PILLAI)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dt. 31st May, 2019

**GMV*

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

- TRUE COPY -

By Order,

ASSISTANT REGISTRAR
ITAT Delhi Benches

S.No.	Details	Date
1	Draft dictated on Dragon	28.5.19
2	Draft placed before author	30.5.19
3	Draft proposed & placed before the Second Member	31/5/19
4	Draft discussed/approved by Second Member	31/5/19
5	Approved Draft comes to the Sr. PS/PS	31/5/19
6	Kept for pronouncement	31/5/19
7.	Order uploaded on	
8	File sent to Bench Clerk	
9	Date on which the file goes to Head Clerk	
10	Date on which file goes to A.R.	
11	Date of Dispatch of order	