IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1'NEW DLEHI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT
AND
SHRI K. NARSIMHA CHARY, JUDICIAL MEMBER

ITA.Nos. 378 & 379/Del/2015
Assessment Years: 2008-09, 2009-10

DCIT,	**vs**	**Bain & Company India Pvt.Ltd.,**
Circle-1(1), Gurgaon.		**5th Floor, Building No.-8,**
		Tower-A, DLF Cyber City,
		Phase-II, Gurgaon
		PAN-AACCB8671R
(Applicant)		**(Respondent)**

C.O.Nos. 275 & 276/Del/2015
ITA.Nos. 378 & 379/Del/2015
Assessment Years: 2008-09, 2009-10

Bain & Company India Pvt.Ltd.	**vs**	**DCIT,**
5th Floor, Building No.-8,		**Circle-1(1), Gurgaon.**
Tower-A, DLF Cyber City,		
Phase-II, Gurgaon		
PAN-AACCB8671R		
(Applicant)		**(Respondent)**

Appellant by: Sh. Sandeep Kumar Mishtra, Sr.DR
Respondent by: Sh. Tarandeep Singh, Adv. &
Sh. Anshul Sharma, AR

Date of hearing: 22/07/2019
Date of order: 25/07/2019

ORDER

PER K. NARSIMHA CHARY, J.M.

Challenging the order dated 5/11/2014 in appeal numbers 547/11-12 and 139/13-14 for the assessment years 2008-09 and 2009-10 passed by the learned Commissioner of Income Tax (Appeals), Faridabad ("Ld. CIT(A)"), Revenue preferred these two appeals.

2. Brief facts of the case are that M/s Bain & Company India Pvt. Ltd. ("the assessee") was incorporated on 11/5/2006 as a 99.9 N percent subsidiary of 'Bain & Company Incorporation Inc., USA ("Bain USA") and has been engaged in the business of providing Management Consultant Services in India and is a part of their operations, the assessee has been providing and receiving Management Consulting Services to/from its overseas group entities.

3. For the assessment years 2008-09 and 2009-10 they have filed their return of income declaring a total loss of Rs. 7,96,12,217/-and Rs.8,09,51,666/-. In respect of the "international transactions" entered into by the assessee, during these two assessment years, a reference to the Ld. TPO for determination of arm's-length price under section 92CA(3) of the Income Tax Act, 1961 (for short "the Act") was made and the Ld. TPO did not draw

any adverse inference with respect to any of the transactions, but for payment of royalty (class-III transaction) by the assessee to Bain USA and made an upward adjustment of Rs. 69, 61, 358/-for the assessment year 2008-09 and Rs. 1, 04, 88, 765/-in respect of the assessment year 2009-10, pursuant to which, learned Assessing Officer passed an order under section 143(3) of the Act assessing the income of the assessee at Rs. 7,26,50,859/-for the assessment year 2008-09 and Rs. 7,04,62,900/-for the assessment year 2009-10.

4. It could be seen from the record that assessee challenged the Transfer Pricing adjustments in appeal, and the Ld. CIT(A) by way of the impugned common order deleted the same. Hence, the Revenue is in appeal whereas the assessee filed the cross objections, alleging that the Ld. CIT(A) should have adjudicated on the fact that the benefit has been conferred on the assessee from the use of consulting techniques and know-how including consulting toolkits and insights developed and maintained by Bain USA for which the royalty was paid by the assessee by considering the information and documents submitted by the assessee to demonstrate the benefit received by the assessee from the use of intangible assets for which the royalty payment was made to the Bain & Company Inc.

5. Contention of the Ld. DR is that there was no rendering of any service whatsoever by Bain USA to the assessee and even if the services said to have been rendered or accepted, such services are only duplicate services which the assessee got through their own resources. He further submitted that no cost has ever been incurred by the Bain USA as claimed by them at 5% of the total turnover. He further submitted that whether the assessee was provided the benefits of the R&D conducted by Bain USA. He further submitted that if at all the assessee received any benefit of the tangibles from Bain USA, the assessee would not have been running in losses.

6. By inviting our attention to page No. 185 of the paper book, Ld. DR argued that the Bain USA has not wasted the patent with respect to its consulting insights and toolkits. He also submitted with reference to para 9.3 at page No. 186 of the paper book that though it is stated that Bain USA incurs about 5% of all its overall turnover as expenditure on the R&D, there is no evidence to show the same or its benefit to the assessee. He also brought to our notice the observations of the Ld. TPO that the 'Bain' brand is not a known name in India and that the right to use the intangible like 'Bain' brand, "know-how", "technology" etc has not been resulted in any tangible benefit to the assessee as the company has been running in losses.

7. Basing on all these things Ld. DR submitted that the Ld. CIT(A) committed error in deleting the addition on account of adjustment made by the Ld. TPO to determine the arm's length price for payment of royalty, by the assessee to Bain USA by holding that in case an expense has been incurred for the purpose of business, there is no need to link it with the profit arising from the same and that the Ld. TPO is not justified in applying CUP method using "benefit test" for the purpose of benchmarking the international transaction undertaken by the assessee.

8. On behalf of the assessee, it is the submission by the Ld. AR that the assessee had undertaken a detailed economic analysis using both internal and external CUPdata and the same was part of the TP study maintained by the assessee and further as requested by the Ld. TPO, the same was filed before the Ld. TPO but the Ld. TPO failed to consider the same in its proper perspective. It is further argued by the Ld. AR that the assessee had discharged the onus of proving the payment of royalty transaction and its being at arm's length and the Ld. TPO failed to provide specific reasons for rejecting the internal and external CUP and also is undertaken by the assessee.

9. Ld. AR submitted that pursuant to the royalty agreement, the assessee had access to the techniques and know-how developed by Bain USA and the same includes intangible asset base of Bain

USA which would include techniques and know-how; 'Bain' brand which would include brand-name such as 'Bain', 'Bain' and company, Bain.com, 'Bain' ventures etc; expertise in the industry sectors pertinent to meeting the needs of the clients; consultancy processes, methodologies, strategies and techniques required in rendering consulting services; and internal compiler market research studies and consumer surveys etc. According to the assessee, the major areas of focus for developing techniques and know-how by the Bain USA include the consulting systems, consulting strategies, professional techniques, consulting know-how etc.

10. Ld. AR placing reliance on the decision of the Hon'ble Delhi High Court in the case of AWB India private limited vs. CIT 166 TTJ 521 (Del) and Sony Ericsson mobile communications India private limited vs. CIT 374 ITR 118 (Del) in support of his submission argued that the question of payment of royalty cannot be determined on the basis of profitability or earnings of the assessee, once it is accepted that know-how and technical information was provided; that in the absence of any material to disprove that the impugned payments are made under the agreement with the AE to provide certain services, the actual use of services depends on whether or not use of such services was warranted by the business situations whereas payments under contracts are made for all such

services as the user may require during the period covered is enough to sustain the payment of royalty.

11. We have gone through the record in the light of the submissions made on either side. It could be seen that the learned Ld. CIT(A) considered the question of linking the profitability of the assessee to determine if a royalty payment is warranted for the use of tangibles and the application of CUP method as a comparable uncontrolled transaction in comparable circumstances.

12. Ld. CIT(A) following the decision of the Hon'ble Delhi High Court in the case of EKL appliances Ltd in ITA No. 1068/2011 and ITA No. 1070/2011 wherein it was held that in case an expense has been incurred for the purpose of business, there is no need to link it up with the profit arising from the same. Ld. CIT(A) observed that it is important to appreciate that both assessee and the Ld. TPO have applied CUP method and knotted TNMM where the disallowance can be based on profitability of business and therefore in line with the judgement in EKL appliances (supra) the approach of the Ld. TPO cannot be sustained.

13. On the aspect of the application of CUP method as comparable uncontrolled transaction, Ld. CIT(A) observed that based on the harmonious reading of rule 10 B, tenancy, the OECD

guidelines and the plethora of judicial precedents are available on the issue, the application of CUP method a comparable uncontrolled transaction in comparable circumstances is a necessary condition and the use of benefit to test and not an actual transaction as the CUP to determine the a LP of royalty paid as nil, by the Ld. TPO cannot be sustained. On this aspect Ld. CIT(A) held that the Ld. TPO was not justified in applying CUP method using "benefit test" for the purpose of benchmarking the international transaction undertaken by the assessee.

14. We have also gone through the judgement of the Hon'ble Delhi High Court in the case of Sony Ericsson mobile communications India private limited (supra) and it is clearly held by the Hon'ble High Court that the question of payment of royalty cannot be determined on the basis of profitability or earnings of the assessee, once it is accepted that know-how and technical information was provided. Hon'ble High Court rejected the findings of the Ld. TPO that the assessee had not derived any commercial benefit as technology and know-how had not resulted in any substantial profit increase as totally unsustainable and the profitability of the assessee could have been lower are varied due to various reasons and lower profitability in one or more years cannot lead to the conclusion that no benefits were derived or technology was unproductive.

15. We find it difficult to ignore the contention of the assessee has been that the assessee had a compounded annual growth rate of 31.31% from FY 2006-07 to FY 2012-13 and the sale had been rapidly growing over the past few years, whereas, the growth in royalty payment to Bain USA has been negligible in comparison at 1% on domestic Revenue and 2% on foreign Revenue (affecting royalty of 1.18%) paid to Bain USA, for there is no evidence to disprove the same. On a perusal of the result of the search carried out by the taxpayer from the SIA database summarised by the Ld. CIT(A) in his order at page No. 14 we are satisfied that the payment made by the assessee to Bain USA is far less than the list percentage paid by E.Merck (India) Ltd at 2%. Further as is evident from the order of the Ld. TPO at page No. 5, the Bain USA said to have provided the specialised expert eyes and vide spectrum of consulting capability which are running into dozens.

16. On a careful consideration of all these services are enumerated by the Ld. TPO himself in his order and in the light of the decisions of the Hon'ble Delhi High Court in the case of Sony Ericsson (supra), AWB India private limited (supra) and EKL appliances (supra) we are of the considered opinion that the Ld. TPO erred in applying the benefit test, in the absence of any dispute as to the actual payment or the provision of services by Bain USA at the disposal of the assessee by way of models at their

website which the assessee accesses and applies as and when necessary. With this view of the matter where unable to agree with the Ld. DR that the Ld. CIT(A) committed any error in upholding the contention of the assessee and in deleting the addition made on the suggestion of the Ld. TPO.

17. We, therefore, uphold the reasoning given and conclusions reached by the Ld. CIT(A) in the impugned order. We accordingly conclude that these appeals are devoid of merits and are liable to be dismissed. In view of our conclusion to dismiss the appeals, we find that the COs have become infructuous and those are also liable to be dismissed.

18. In the result, both the appeals of the Revenue and Cos preferred by the assessee are dismissed.

Order Pronounced in the Open Court on 25/07/2019.

Sd/-	sd/-
(PRAMOD KUMAR)	**(K. NARSIMHA CHARY)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 25 /07/2019
'VJ'

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

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