IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI B.R BASKARAN, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

IT(TP)A No.1403/Bang/2010
Assessment year : 2006-07

IT(TP)A No.1218/Bang/2011
Assessment year : 2007-08

TNT India Pvt. Ltd., No.82/1, Richmond Road, Bengaluru-560 025. PAN – AAACT 6649 K.	Vs.	TheDy. Commissioner of Income-tax, Circle-12(4), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri Dhanesh Batra, C.A & Ms. Chandni Shah, C.A
Respondent by	:	Shri E.S Nagendra Prasad, CIT (DR)

Date of hearing	:	20.06.2019
Date of Pronouncement	:	09.09.2019

O R D E R

Per B.R Baskaran, Accountant Member

Both the appeals filed by the assessee are directed against the orders passed by the AO u/s 143(3) r.w.s 144C of the Act pursuant to directions issued by ld Dispute Resolution Panel (DRP) and they relate to asst. years 2006-07 and 2007-08. Since the issues urged in these appeals are identical in nature, they were heard together

and are being disposed of by this common order, for the sake of convenience.

2. We shall first take up the appeal relating to asst. year 2006-07. The assessee has filed revised grounds of appeal and additional grounds of Appeal. The Ground No.1 and 2 raised in revised grounds of appeal are general in nature. The Ld A.R did not press ground Nos.3 and 6.The ld AR also did not press ground Nos.13 to 15 due to smallness of the amount. Ground Nos.16 to 19 are consequential in nature and hence they do not require adjudication. The Ld A.R did not press additional grounds due to smallness of the amount.

3. The remaining grounds are:-

(a) Ground Nos.4 and 5, which relate to Transfer Pricing adjustment made in respect of "Express services transaction" and

(b) Ground Nos.7 to 12, which relate to Transfer Pricing Adjustment in respect of "Payment of management and administration fee".

4. The assessee herein is a wholly owned subsidiary of TNT express. The assessee is engaged in the business of distribution of freight, parcels and documents all over the world. The assessee enters into contract with Indian Customers for delivering freight, parcels and documents to destinations outside India. For the purpose of delivering such packages outside India, the assessee utilizes the services of TNT net work available all over the world and makes payment for the same. The activities relating to distribution

of freight, parcels and documentshave been termed as 'Express services'. The assessee has also paid management and administration fee to its associated enterprises.

5. In respect of express services and payment of management& administration fee, the assessee selected its 'foreign AE' as tested party. It adopted TNMM method as most appropriate method. The case of the assessee is that it has derived 96% of its business receipts from international transactions and hence the associated enterprise was selected as tested party. The foreign comparables selected for benchmarking the "Express Service" transactions gave an arithmetic mean of 9.44%. Since the markup charged by AE to the assessee was in the range of 3 to 5%, the assessee submitted that the transactions entered by it under 'express services' division are at arms length.

6. In respect of payment of management & administration fee also, the assessee selected its associated enterprise as tested party. The operating margin of foreign comparables worked out to 8.29%, while the mark up made by the tested party to the assesssee was in the range of 5 to 8%. Accordingly it was contended that the payment of management and administration fee was also at arms length.

7. The TPO however took the view that the foreign associated enterprises cannot be considered as tested party. Accordingly the TPO rejected the TP study conducted by the assessee. The TPO selected his own comparables (Indian comparables) and made

adjustment of 25.15 crores on account of 'express service' transaction. The TPO determined the arms length price of management and administration fee as Nil, since the assessee did not pay any management fee in the earlier years and further the assessee did not show any tangible material in order to demonstrate that it has derived commercial benefit on payment of the management fee. The ld DRP confirmed the additions proposed by the TPO. Accordingly the AO passed the final asst. order making the adjustments confirmed by ld DRP.

8. The Ld A.R submitted that the tax authorities are not justified in rejecting the selection of Foreign AE as tested party. He submitted that an identical question was examined by the co-ordinate bench in the assessee's own case in ITA No.1443 & 1444/Bang/08 and the Tribunal, vide its order dated 3-11-2016 has held as under:-

> "13. The Ld DR did not place any argument against the arguments of the Assessee in this regard, therefore, due to lack of Indian comparable companies, the assessee's arguments are required to be considered.
>
> 14. Hence, it is more appropriate to select foreign AE as the tested party and the financial data of the foreign companies as provided by the Assessee, needs to be verified by the Ld TPO."

The Ld A.R submitted that the assessee herein is serving mainly in international sector, while the comparable companies selected by the Ld TPO were operating in domestic sector and hence they

cannot be considered as comparable companies. Accordingly he submitted that the tax authorities may be directed to accept the selection of foreign AE as tested party.

9. The Ld D.R, on the contrary, placed his reliance on the decision rendered by Kolkatta bench of ITAT in the case of A T & S India (P) Ltd (2016)(72 taxmann.com 324), wherein the Tribunal had held that the foreign AE cannot be selected as tested parties. In this regard, the Kolkatta bench had placed its reliance on the decision rendered by Delhi bench of Tribunal in the case of GE Money Financial Services (P) Ltd vs. ACIT (2016)(69 taxmann.com 420).

10. The Ld A.R submitted that the decision rendered by Delhi bench of Tribunal in the case of GE Money Financial Services (P) Ltd (supra) has since been reversed by the Hon'ble Delhi High Court, vide its order dated 31-08-2016 passed in ITA 662/2016 CM Nos.31740 – 31741/2016 and the issue has been restored to the file of TPO for examining it afresh without being influenced by the observations of the Tribunal.

11. The ld A.R further submitted that the question of selection of Foreign AE as tested party was also examined by the Ahmedabad bench of ITAT in the case of General Motors India (P) Ltd vs. DCIT (2013)(37 taxmann.com 403) and expressed its view as under:-

> "11.4 Considering the divergent views expressed by various Tribunals (supra) and majority of them were in favour of selecting the 'tested party' either from local or foreign party and the United Nation's Practical Manual on transfer pricing

for developing Countries had observed that 'It may be local of the foreign party, we tend to agree with the same."

Accordingly, the Ld A.R submitted that the selection of foreign AE as tested party should be accepted in the facts and circumstances of the case.

12. We have heard rival contentions on this issue and perused the record. The co-ordinate bench of Tribunal has agreed with selection of foreign AE as tested party in the assessee's own case (referred supra). The Ahmedabad bench of Tribunal has also agreed with the said proposition in the case of General Motors India (P) Ltd (supra). The Ld D.R placed his reliance on the decision rendered by Kolkatta bench of Tribunal in the case of AT & S India (P) Ltd (supra) to support his contention that foreign AE cannot be taken as tested party. As pointed out by Ld A.R, the Kolkatta bench has taken such a view by placing its reliance on the decision rendered by Delhi bench of Tribunal in the case of GE Money Financial Services (P) Ltd (supra) and the decision so rendered by Delhi bench in the above said case has since been reversed by the Hon'ble Delhi High Court. Hence the decision rendered by the co-ordinate bench in the assessee's own case (referred supra) and the decision rendered by Ahmedabad bench of Tribunal in the case of General Motors India (P) Ltd (supra) need to be followed. Accordingly we hold that the assessee was justified in selecting Foreign AE as tested party.

13. We have earlier noticed that the TPO had selected the assessee as tested party and has selected his own comparable

Indian companies for bench marking the assessee's transactions. The contention of the assessee is that the Indian comparable companies are operating mainly in domestic field, while the assessee has generated major part of its income, i.e. about 96% from international operations. Accordingly, the assessee has contended that the Indian companies cannot be taken as comparable companies. In any case, we have held that the foreign AE can be taken as tested party. In that case, the entire issue relating to determination of Arms Length Price of the transactions under Express Service segment needs to be examined afresh. Accordingly we set aside the order passed by the AO on this issue and restore this issue to the file of AO/TPO for examining this issue afresh.

14. The next issue relates to payments made by the assessee to its AEs towards Management and Administration Services. As noticed earlier, the TPO had determined the ALP of the transactions as NIL, since the assessee could not demonstrate the benefit derived from such services.

15. We notice that the assessee had adopted Foreign AE as the tested party in order to bench mark the transactions, which was not accepted by TPO. The assessee also placed its reliance on the decisions rendered by Pune bench of Tribunal in the case of Emerson Climate Technologies India Ltd (2018)(90 taxmann.com 125) to support its submission that the benefit test is irrelevant while determining the Arms Length price of transactions. The Ld A.R also submitted that the AO has himself has observed that the

TNT group has provided many services to the assessee. He further submitted that the assessee has provided many documents/evidences to demonstrate that it has received services from its AEs. Accordingly he submitted that the tax authorities are not justified in determining the ALP of transactions as NIL.

16. On the contrary, the Ld D.R placed his reliance on the decision rendered by co-ordinate bench in the case of TNT Express Wordwide (UK) Ltd (IT(TP)A No.6/Bang/2011 dated 29-04-2016), wherein the determination of ALP of the transactions relating to payment for services as NIL was upheld by the co-ordinate bench of Tribunal. He further submitted that an identical view was expressed by the co-ordinate bench in the case of Volvo India (P) Ltd (2018)(89 taxmann.com 79).

17. In the rejoinder, the Ld A.R submitted that the co-ordinate bench has decided against the assessee in the above cited two cases on the reasoning that the assessees therein did not provide any material to support the receipt of services. He submitted that the assessee has furnished various materials and further the AO himself has observed that the assessee has received the services from its AEs.

18. We heard the parties on this issue and perused the record. With regard to benchmarking of payments made towards Management and Administration services, we may take support from the following observations made in the decision rendered by

the co-ordinate bench in the case of DMG Moriseiki India Machines and Services P Ltd (IT (TP) A No.1192/Bang/2011:-

22. The law in this regard is now fairly settled. In the case of Dresser Rand India Pvt.Ltd. Vs. ACIT ITA No.8753/Mum/2010 AY 2006-07 order dated 7.9.2011, the Hon'ble Mumbai Tribunal had an occasion to examine as to what is the approach that has to be adopted for determining ALP in the case of cost contribution agreement which is akin to the arrangement in the present case between the Assessee and its parent company. The assessee in case of Dresser Rand (supra) entered into a '*cost contribution agreement*' with its parent company pursuant to which it paid a sum of Rs. 10.55 crores as its share of the costs. The TPO, AO & DRP disallowed the expenditure on the ground that the ALP was 'Nil' as *no real services* had been availed by the assessee and the arrangement was not genuine. On further appeal by the Assessee, the Tribunal held as follows:

> *"8. We find that the basic reason of the Transfer Pricing Officer's determination of ALP of the services received under cost contribution arrangement as 'NIL' is his perception that the assessee did not need these services at all, as the assessee had sufficient experts of his own who were competent enough to do this work. For example, the Transfer Pricing Officer had pointed out that the assessee has qualified accounting staff which could have handled the audit work and in any case the assessee has paid audit fees to external firm. Similarly, the Transfer Pricing Officer was of the view that the assessee had management experts on its rolls, and, therefore, global business oversight services were not needed. It is difficult to understand, much less approve, this line of reasoning. It is only elementary that how an assessee conducts his business is entirely his prerogative and it is not for the revenue authorities to decide what is necessary for an assessee and what is not. An assessee may have any number of qualified accountants and*

management experts on his rolls, and yet he may decide to engage services of outside experts for auditing and management consultancy; it is not for the revenue officers to question assessee's wisdom in doing so. The Transfer Pricing Officer was not only going much beyond his powers in questioning commercial wisdom of assessee's decision to take benefit of expertise of Dresser Rand US, but also beyond the powers of the Assessing Officer. We do not approve this approach of the revenue authorities. We have further noticed that the Transfer Pricing Officer has made several observations to the effect that, as evident from the analysis of financial performance, the assessee did not benefit, in terms of financial results, from these services. This analysis is also completely irrelevant, because whether a particular expense on services received actually benefits an assessee in monetary terms or not even a consideration for its being allowed as a deduction in computation of income, and, by no stretch of logic, it can have any role in determining arm's length price of that service. When evaluating the arm's length price of a service, it is wholly irrelevant as to whether the assessee benefits from it or not; the real question which is to be determined in such cases is whether the price of this service is what an independent enterprise would have paid for the same.

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10. In case the Assessing Officer comes to the conclusion that the assessee has indeed received the services from the AE the next question which we have to decide is as to what is the arm's length price of these services received under cost contribution agreement. It hardly needs to be emphasized that even cost contribution arrangement should be consistent with arm's length principle, which, in plain words, requires that assessee's share of overall contribution to the costs is consistent with benefits expected to be received, as an independent enterprise would have assigned to the contribution in hypothetically similar situation. .."

23. The Hon'ble High Court of Delhi in the case of *EKL Appliances Limited [(2012) 209 Taxman 200] as well* as Cushman & Wakefield

India Private Limited ITA No.475/2012 dated 23.5.2014 367ITR 730 (Del), rendered similar ruling as was rendered in the case of Dresser Rand (supra). In the case of Cushman & Wakefield (supra), the Hon'ble Delhi High Court observed that whether a third party – in an uncontrolled transaction with the Taxpayer would have charged amounts lower, equal to or greater than the amounts claimed by the AEs, has to perforce be tested under the various methods prescribed under the Indian TP provisions. In the context of cost sharing arrangement, the Hon'ble High Court opined that concept of base erosion is not a logical inference from the fact that the AEs have only asked for reimbursement of cost. This being a transaction between related parties, whether that cost itself is inflated or not only is a matter to be tested under a comprehensive transfer pricing analysis. The basis for the costs incurred, the activities for which they were incurred, and the benefit accruing to the Taxpayer from those activities must all be proved to determine first, whether, and how much, of such expenditure was for the purpose of benefit of the Taxpayer, and secondly, whether that amount meets ALP criterion."

19. Accordingly, the test to be applied is whether a third party – in an uncontrolled transaction with the Taxpayer would have charged amounts lower, equal to or greater than the amounts claimed by the AEs, has to perforce be tested under the various methods prescribed under the Indian TP provisions. In the instant case, it is the contention of the assessee that it has furnished documents/evidences in support of receipt of services. It is also the submission of the assessee that the AO himself has accepted the fact of receipt of services. Under these set

of facts, we are of the view that the TPO/DRP was not justified in determining the ALP as NIL without examining the nature of services received by the assessee and without finding the amount that would have been paid in an uncontrolled transactions,. Hence we are of the view that this issue also requires examination at the end of AO/TPO. Accordingly, we restore this issue also to the file of AO/TPO.

20. We shall now take up the appeal filed by the assessee for AY 2007-08. As stated in AY 2006-07, the Ld A.R did not press many grounds on identical reasons. The remaining grounds relate to the two issues discussed supra in AY 2006-07. Since the facts are identical, consistent with the view taken in Assessment Year 2006-07, we restore both the issues to the file of the AO in AY 2007-08 also with similar directions.

21. In the result, both the appeals of the assessee are treated as allowed for statistical purposes.

Order pronounced in the Open Court on **9th September, 2019.**

Sd/-	**Sd/-**
(Pavan Kumar Gadale)	**(B.R Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated, 9th September, 2019.

/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation ……

2. Date on which the typed draft is placed before the dictating Member …….
3. Date on which the approved draft comes to Sr.P.S …….
4. Date on which the fair order is placed before the dictating Member ……..
5. Date on which the fair order comes back to the Sr. P.S. ……..
6. Date of uploading the order on website……..
7. If not uploaded, furnish the reason for doing so ……..
8. Date on which the file goes to the Bench Clerk …….
   Dictation note enclosed
9. Date on which order goes for Xerox & endorsement……
10. Date on which the file goes to the Head Clerk …….
11. The date on which the file goes to the Assistant Registrar for signature on the order …….
12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order …….
13. Date of Despatch of Order. ……..

14. Dictation note enclosed ……