**IN THE INCOME TAX APPELLATE TRIBUNAL**
**MUMBAI BENCH "J", MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND**
**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER**

| **ITA NOS. 2211 & 2212/MUM/2015,**<br>**845/MUM/2016,**<br>**561 & 7250/MUM/2017 &**<br>**7281/MUM/2018** | **A.Ys : 2009-10 TO 2014-15** |
|---|---|

| | | |
|---|---|---|
| Prothious Engineering Services<br>Private Limited,<br>Unit 608, A-wing, 6th floor,<br>Atrium 1-MTR, Andheri Kurla Road,<br>Andheri (E), Mumbai 400 069.<br>**PAN : AADCP5194J** (Appellant) | vs. | DCIT, Circle-8(2)/<br>DCIT, Range-10(3)(2),<br>Mumbai. (Respondent) |

**Assessee by : Shri Arijit Chackravarty &**
**Shri Abhisek Tilak**
**Revenue by : Shri Bhupendra Kumar Singh**

**Date of Hearing : 19/09/2019**
**Date of Pronouncement : 19/09/2019**

**O R D E R**

**PER MAHAVIR SINGH, JUDICIAL MEMBER**

These are six appeals filed by the assessee for assessment years 2009-10 to 2014-15. Appeals for assessment years 2009-10 and 2010-11 are filed against the orders of CIT(A) passed under Section 143(3) r.w.s. 144C(3) of the Income Tax Act, 1916 (in short 'the Act') dated 16.02.2015 and 18.02.2015 respectively while appeals for assessment years 2011-12 to 2014-15 are filed

against the orders of Assessing Officer passed under Section 143(3) r.w.s. 144C(13) of the Act dated Nil, 18.03.2016, 29.09.2017 and 10.10.2018 respectively.

2. The first issue in all these appeals of assessee is with regard to transfer pricing adjustment made by the Transfer Pricing Officer/Assessing Officer not considering the Associate Enterprises (AE) as a tested party. The same was confirmed by the CIT(A). Against the said confirmation by CIT(A), assessee has raised various grounds in all these years. As the facts and circumstances are exactly identical in all these years, hence we take the grounds and facts from assessment year 2009-10 in ITA no. 2211/Mum/2015. The relevant grounds raised for this issue in assessment year 2009-10 reads as under :-

*"1. Ground No 1 - Adjustment/Addition of Rs. 10,23,16,590 to Total Income*

*On the facts and in the circumstances of the case and in law, the learned Transfer Pricing Officer ('TPO') and the learned Assessing Officer ('AO') erred in proposing and the Hon'ble Commissioner of Income-tax (Appeals) [CIT(A)] further erred in confirming the proposed addition of Rs. 10,23,16,590 to the Appellant's total income.*

*2. Ground No 2 - Transfer pricing adjustment exceeds the Appellant Group's combined profit*

*On the facts and in the circumstances of the case and in law, the learned TPO / AO erred in and the Hon'ble CIT(A) further erred in upholding / confirming the action of the learned TPO / AO in making the transfer pricing adjustment which exceeds the profit accruing to the Group as the whole from the end customer and in not appreciating that that it is against natural justice and commercial rationale to expect any one of the participating entities in the entire supply chain to earn more than the combined profits earned by the Group.*

*3. Ground No 3 - Associated Enterprise, being a simpler entity to be considered as the tested party*

*On the facts and in the circumstances of the case and in law, the learned TPO / AO and Hon'ble CIT(A) erred in not giving due consideration to the function, asset and risk profile of the Appellant and its associated enterprise while selecting the tested party. Further, the learned TPO / AO erred in and the Hon'ble CIT(A) further erred in upholding / confirming the action of the learned TPO / AO in treating the associated enterprise of the Appellant to be a more complex entity than the Appellant and considering the Appellant as the tested party and consequently rejecting the Resale Price Method selected by the Appellant in its Transfer Pricing Study.*

*4. Ground No 4 - Incorrect selection of comparables by the learned TPO*

*On the facts and in the circumstances of the case and in law, the learned TPO / AO erred in and the Hon'ble CIT(A) further erred in upholding / confirming the action of TPO in selection of the companies which are functionally not comparable to the Applicant's business.*

*On the facts and in the circumstances of the case and in law, the Learned TPO / AO and Hon'ble CIT(A) erred in comparing comparable companies which broadly fall within the IT enabled services sector without appreciating the fact that the Appellant operates in a specialized domain of computer based designing / detailing and engineering services.*

*5. Ground No 5 – Idle capacity adjustment not granted*

*The learned TPO / AO and the Hon'ble CIT(A) erred in not giving due consideration to the commercial facts and business conditions of the Appellant and consequently not allowing idle capacity adjustment in accordance with the provisions of Rule 10B(1)(e)(iii) of the Income-tax Rules, 1962 to account for difference between international transactions and the alleged comparable uncontrolled transactions selected by the learned TPO.*

*6. Ground No 6 – Tax evasion motive not demonstrated*

*On the facts and in the circumstances of the case and in law, the learned TPO / AO erred in and the Hon'ble CIT(A) further erred in upholding / confirming the action of the learned TPO / AO in failing to appreciate that the Appellant was claiming tax*

*exemption under Section 10A of the Act and accordingly had no intention to shift profits outside India."*

3. Briefly stated, the facts are that the assessee-company is engaged in the business of civil structural, designing and detailing services. During the relevant assessment years, i.e., for assessment years from 2009-10 to 2014-15, it carried business operation from its four undertakings located at Mumbai, Nashik, Chennai and Delhi. The assessee claimed that it is not having any physical presence in the USA and the assessee has an AE which acted as a marketing distributor for the assessee's services. The assessee before us narrated the business carried out and the model of the business which is explained in assessee's written submissions dated 22.08.2019 as under :-

> *"1.1 The AE solicits the customers and also enters into the contract with the ultimate customers under instructions and directions of the Appellant. However it passes on the risks and obligations to the Appellant on a back-to-back basis. Thus, the AE in effect provides marketing and support services and assumes less risk than the appellant viz. Prothious India, which bears the entrepreneurial risks of the success or failure of the enterprise. The Appellant wishes to mention that the AE does not have capability to perform any of the functions that are required for performance of customer contracts. In other words, the AE acts as a marketing distributor for Appellant's services.*
>
> *1.2 <u>Modus Operand of the Appellant</u>*
>
> *Any building drawings for construction requires the Basic Design of the building (which includes Architectural & Structural Design). The customers of the AE are mostly Fabricators who obtain the Basic design as part of the tender & approach the AE for preparation of Detailed Design (which include (i) Shop Drawing, (ii) Beam & Colum Drawing & Connection Drawing. The AE, which is only a marketing distributor of appellant's services, provides the basic drawings to the appellant for obtaining a quotation for rendering services of preparing the Detailed Design of the Building. Most often the fabricators make the basic design available to the appellant by putting it on*

*their server and providing access to the appellant. The Fabricators are also aware of the work to be done by the appellant and are in direct contact with the appellant for changes, updates and other technical discussions as well as timeliness within which the work would get completed. Once the detailed designs are prepared by the appellant, the same is given to the Fabricators directly without any involvement of the AE. (A detailed note on the modus operandi was given as a hand out during the course of the hearing on 23.04.2019, which is marked and annexed as "Annexure- 1").*

*1.3 Operational Capability of the appellant as well as its AE*

*It is submitted that during these Assessment years, the appellant had employees in excess of 1100 comprising of highly trained engineers and technical staff. In comparison, the AE had a staff strength of 11 people including the CFO, 3 finance people, 2 IT assistants & 5 marketing staff*

*(A hand out of the same was given during the course of the hearing on 23.04.2019, which is marked and annexed as "Annexure - 2").*

*1.4 Remuneration Methodology*

*The billing to the customer is done by the AE and payment is made by the customer to the AE directly. The AE is allowed to retain a proportion of revenue such that it covers its cost and a reasonable mark-up and the balance is paid to the Assessee. In Assessment Year 2009-10, the AE retained 15% of the contract amount for the period April to June 2008, thereafter i.e. from July 2008 to March 2009, the retention percentage was increased to 25%. The resultant gross margin of the AE worked out to 19.71% and net margin on sales worked out to 3.24% on sales.*
*(Refer page 93 of paper book for financials of AE).*

*The Appellant wishes to submit that at the time of hearing of the appeals, the Bench, after seeking agreement between both the parties, proceeded to hear only AY 2009 - 10 since the fact pattern is similar in the rest of the years and also the lower authorities have followed the approach as happened in AY 2009 -10. Therefore, for the sake of brevity, we are restricting the following submission to AY 2009 -10 only."*

4. The assessee explained that during the assessment year 2009-10 it received Rs.43,53,71,922/- from its AE towards services sold to the AE for distribution. It was contended that the only international transaction entered into by assessee and reported in its Audit report in Form 3CEB was the interest transaction. Assessee claimed that it has maintained the transfer pricing documents in terms of the provisions of Sec. 92D of the Act read with Rule 10D of the Income Tax Rules, 1962 (in short 'the Rules'). The assessee, based on functional analysis, determined that the AE has less complex operations, bears less risk and does not own valuable intangible properties or unique assets. He contended that as compared to the AE, the assessee undertakes significant research and development which constantly researches and develops new and enhanced production techniques to improve efficiency of production customized to client and thus bears risk of failure of business. It was claimed by assessee that it extensively co-ordinates with the team and interacts with other specialists involved in the customer project like architects, MEP consultants and erection engineers. In view of this, it was claimed that assessee bears market risk, contract risk and idle capacity risk which are borne by the AE to a very limited extent. Considering the aforesaid FAR profile, assessee's counsel argued that the AE was determined to be least complex entity and accordingly, was selected as a tested party for the economic analysis. But the Transfer Pricing Officer (TPO) has not selected the AE as a tested party and also listed certain foreign companies as comparables to the AE, which are engaged in providing market support services. The TPO vide show cause notice asked the assessee as to why assessee shall not be selected as a tested party and shall not be compared with companies engaged in ITeS sector for benchmarking the transaction under consideration. For this purpose of benchmarking, the TPO provided list of 14 Indian comparable companies

and the TPO also made observations that the AE is engaged in preparing basic designs and hence is a more complex entity without any basis to support his reasoning. The TPO disregarded the submissions made by the assessee and also evidences produced before him and considered the assessee as a tested party instead of its AE. The arm's length price of the eight comparable companies was computed at 26.57% and made adjustment of Rs.10,23,16,592/-. Before the CIT(A), assessee raised various arguments and filed submissions, but the CIT(A) upheld the order of the TPO/Assessing Officer. Aggrieved, now the assessee is in appeal before the Tribunal. Before us, the learned counsel for the assessee, Shri Arijit Chakrabarty only contended that the foreign AE should be taken as a tested party, and for this, he filed various details before us in the following Paper Books :-

i) Paper Book in ITA No. 2212/Mum/2015 (pages 1 to 132)
ii) Additional evidence filed in ITA No. 2212/Mum/2015 (pages 133 to 313)
iii) Paper Book in ITA No. 845/Mum/2016 (pages 1 to 234)
iv) Paper Book in ITA No. 561/Mum/2017 (pages 1 to 357)
v) Compendium I (for all the appeals) (pages 1 to 250)
vi) Compendium II (for all the appeals) (pages 251 to 799)

He stated that the details filed before the Tribunal were also before the CIT(A), but they were not gone into by either the CIT(A) or the TPO. The learned counsel for the assessee stated that it is a settled position under Indian law regarding selection of foreign AE as a tested party, and for this, he relied on the following case laws :-

i) Landis + Gyr Limited (ITA No. 37/Kol/2012 & 1623/Kol/2012)
ii) Ranbaxy Laboratories Ltd. [2016] 68 taxmann.com 322 (Delhi-Trib.)
iii) Development Consultants Pvt. Ltd. vs DCIT (115 TTJ 577)

iv) General Motors India Pvt. Ltd. vs DCIT (ITA Nos. 3096/Ahd/2010 and 3308/Ahd/2011)/[2013] 37 taxmann.com 403 (Ahmedabad-Trib.)
v) Royal Canin India Pvt. Ltd., ITA No. 1053/Mum/2015
vi) ITO vs WNS Global Services Pvt. Ltd., ITA No. 2318 & 1886/Mum/2009 dated 04.05.2018
vii) Nivea India Pvt. Ltd. vs DCIT, ITA No. 121/Mum/2013 dated 21.08.2017

Further, he referred to the following cases where foreign AE was taken as a tested party :-

i) Mastek Limited vs Addl. CIT (ITA No. 3120/Ahd/2010)
ii) Dy. Commissioner of Income Tax vs ITC Infotech India Ltd., ITA No. 2222 & 2223/Kol/2010, [2015] 53 taxmann.com 253 (Kolkata-Trib.)

He also relied on the decision of the Hon'ble Delhi High Court in the case of *GE Money Financial Services Pvt. Ltd. (ITA No. 662/2016, CM Nos. 31740-31741/2016)* wherein selection of foreign AE as a tested party was remanded back with the following observations :-

> *"The question of law which the assessee/appellant argues in this appeal for AY-2009-2010 is regarding the appropriateness and correctness of treating the Foreign/Associated Enterprises (AEs) as a tested party. The assessee's transfer pricing analysis and determination of ALP led it to approach to ITAT which by impugned order has remitted the matter for consideration of the most appropriate method as well as question of the appropriate comparables applicable in the circumstances of the case. The assessee has approached this court against the observations and findings of the ITAT – in paras 10 to para 18 to the effect that the Foreign AE cannot be considered as a tested party. Reliance is placed upon Section 92B to contend that there is nothing in the provision inhibiting such consideration.*
>
> *This court notices that for re-consideration and determination of the appropriate method as well as appropriate comparables and the tested party, it would be convenient and appropriate for the TPO to consider the*

*question which the assessee urges in the present case. The TPO is therefore directed to overlook and not feel bound by the observations of the tribunal and render findings on the merit of the issue."*

5. In view of the above, the learned counsel for the assessee stated that the primary data for transfer pricing analysis with foreign AE as a tested party is available with the assessee and it involves verification of AE's data. He narrated that the said data in the form of e-mails, customer correspondence has already been submitted in assessee's paper book to substantiate FAR analysis of the AE. Further, the financial statement of the AE has already been submitted and the relevant information of the AE has already been submitted by the assessee before the CIT(A). In terms of the above, the learned counsel requested that the matter can be restored back to the file of the TPO/AO for afresh verification and for considering whether the foreign AE can be taken as a tested party for benchmarking the assessee's arm's length price.

6. When these facts were confronted to the Senior DR, he fairly agreed that the matter can be restored back to the file of the TPO/Assessing Officer.

7. After hearing both the sides and going through the facts of the case, we noted that the claim of assessee regarding information relating to the AE has been submitted and can be verified by the TPO/Assessing Officer because voluminous paper books have been filed before us which we cannot verify. In case the assessee is able to establish based on FAR that the foreign AE is the simpler entity, same can be taken as a tested party provided the details are provided by the assessee. In terms of the above, we are of the view that this issue is to be examined by the TPO/Assessing Officer afresh after verifying the complete TP study and whether the AE can be taken as a tested party for

benchmarking international transaction of the assessee. Hence, this issue of the assessee's appeal is restored back to the file of the TPO/Assessing Officer. The orders of the lower authorities are set aside and this issue of assessee's appeal is allowed for statistical purposes.

8. As the facts and circumstances in assessee's appeals bearing ITA Nos. 2212/Mum/2015, 845/Mum/2016, 561/Mum/2017, 7250/Mum/2017 & 7281/Mum/2018 with regard to the said issue are similar to that in assessment year 2009-10, our decision therein shall apply *mutatis mutandis* to the said appeals also.

9. The next issue in assessment year 2009-10 in ITA No. 2211/Mum/2015 is as regards to erroneous computation of deduction under Section 10A of the Act by the Assessing Officer and confirmed by the CIT(A) in regard to setting off of losses in certain units against the profits of its other unit availing tax benefit under Section 10A of the Act. For this, assessee has raised the following ground no. 7 :-

*"7. Ground No 7 - Erroneous computation of deduction under Section 10A of the Act*

*The learned AO and the Hon'ble CIT(A) erred in setting off of losses of the certain units of the Appellant against the profits of the its other units availing tax benefit under Section 10A of the Act and allowing deduction of only the residual profit under Section 10A of the Act."*

10. Briefly stated, the facts are that the Assessing Officer during the course of assessment proceedings noted that during the relevant assessment year, assessee-company was having 4 STPI units situated at Nashik, Mumbai,

Chennai and Delhi. The Assessing Officer has gone through the relevant details such as location of the undertaking, date of initial registration, date of commencement of manufacture, etc. in respect of claim of deduction under Section 10A of the Act. According to the Assessing Officer, assessee claimed total deduction under Section 10A of the Act at Rs.10,71,19,655/- on the total profit derived from the STPI of Rs.2,69,15,297/-. According to the Assessing Officer, assessee computed total income at Rs.8,02,04,358/- and claimed deduction under Section 10A of the Act and carried forward the loss to the subsequent years for set-off. The Assessing Officer has worked out the entire working of deduction claimed by the assessee under Section 10A of the Act in respect of the four STPI units as under :-

| Sr. No. | Particulars | Nashik | Chennai | Mumbai | New Delhi | Total |
|---|---|---|---|---|---|---|
| 1 | Turnover of Undertaking STPI | 238,438,473 | 76,698,716 | 102,308,328 | 17,926,405 | 437,949,561 |
| 2 | Total Profit Derived from Undertaking | 107,119,655 | 59,064,317 | -7,146,369 | -13,993,672 | 26,915,297 |
| 3 | Total Export Turnover | 238,438,473 | 76,698,716 | 102,308,328 | 17,926,405 | 437,949,561 |
| 4 | Export Proceeds Received in Convertible Foreign Exchange | 238,438,473 | 76,698,716 | 102,308,328 | 17,926,405 | 437,949,561 |
| 5 | Amt. of Ded. u/s 10A | 107,119,655 | 0 | 0 | 0 | 107,119,655 |

11. According to the Assessing Officer, the assessee is eligible for claim of deduction under Section 10A of the Act after setting off of brought forward loss and accordingly, through show cause notice vide order sheet dated 13.02.2013, the assessee was asked as to why the deduction under Section 10A of the Act claimed at Rs.10,71,19,655/- should not be restricted to the total income disclosed. Accordingly, the Assessing Officer restricted the

deduction under Section 10A of the Act at Rs.2,69,15,297/- and disallowed the balance deduction. Aggrieved, assessee preferred appeal before the CIT(A) on this issue. The CIT(A) also confirmed the action of the Assessing Officer by observing as under :-

> *"viii. To sum up, AO mentioned that the total income of the assessee is to be computed as per the provisions of the Act and deduction u/s. 10A is to be allowed up to extent of total income of the assessee. Therefore, considering the facts and circumstances of the case, the material available on record, statutory provisions the deduction under section 10A was computed by AO as under :*

| *Particulars* | *Amt (Rs.)* |
|---|---|
| *Total Income before den u/s 10A as per assessee's computation of income* | *2,69,15,297* |
| *Less : Deduction under section 10A of the Act to the extent* | *2,69,15,297* |
| *Taxable Income* | *Nil* |

Aggrieved, now assessee is in appeal before the Tribunal.

12. At the outset, the learned counsel for the assessee stated that this issue now stands covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of *CIT vs M/s. Yokogawa India Ltd., 391 ITR 274 (SC)*, wherein the Hon'ble Supreme Court has held that the provisions of Sec. 10A of the Act is a exemption provision and it is clear that deduction contemplated therein is *qua* the eligible undertaking of an assessee standing on its own and without reference to any other eligible or non-eligible units or undertaking of the assessee. The benefit of deduction is to be given to the individual undertaking and resultantly flows to the assessee. The Hon'ble Supreme Court has deliberated this in para 16 to 18 of its order as under :-

*"16. From a reading of the relevant provisions of Section 10A it is more than clear to us that the deductions contemplated therein is qua the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular No. 794 dated 9.8.2000 which states in paragraph 15.6 that,*

> *"The export turnover and the total turnover for the purposes of sections 10A and 10B shall be of the undertaking located in specified zones or 100% Export Oriented Undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision."*

*17. If the specific provisions of the Act provide [first proviso to Sections 10A(1); 10A (1A) and 10A (4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous Circular of the department (No. 794 dated 09.08.2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10A as 'total income of the undertaking'.*

*18. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by holding that though Section 10A, as amended, is a provision for deduction, the stage of*

*deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly."*

13. When this fact was pointed out to the learned senior DR, he stated that the matter may be restored back to the file of the Assessing Officer for computing the deduction under Section 10A of the Act after verification of the facts in terms of the decision of the Hon'ble Supreme Court in the case of *M/s. Yokogawa India Ltd. (supra)*.

14. After hearing both the sides, we direct the Assessing Officer to compute the deduction in terms of the decision of the Hon'ble Supreme Court in the case of *M/s. Yokogawa India Ltd. (supra)*.

15. The next issue in the appeal of the assessee in ITA No. 2211/Mum/2015 is with regard to not granting or not allowing set-off of carried forward losses of assessment year 2008-09. For this, assessee has raised the following ground no. 8 :-

*"8. Ground No 8 – Set off of carried forward losses of AY 2008-09 not granted*

*The learned AO and the Hon'ble CIT(A) erred in not allowing set-off of carried forward losses of AY 2008-09 against the taxable income of the Appellant for the year under consideration as determined by learned AO."*

16. At the outset, both the learned counsel for the assessee as well as the learned senior DR agreed that let this issue be set aside to the file of the Assessing Officer for verification of facts and accordingly deciding the issue

whether the carried forward losses is to be set-off or not. Hence, this issue is set-aside to the file of the Assessing Officer.

17. The next issue in the appeal of assessee in ITA No. 2212/Mum/2015 for assessment year 2010-11 is with regard to credit of Fringe benefit tax paid not provided amounting to Rs.85,000/-. For this issue, the assessee has raised ground no. 7 as under :-

*"Ground No. 7 – Credit of the fringe benefit tax paid not provided*

*The learned AO and the Hon'ble CIT(A) erred in not providing credit of the fringe benefit tax paid amounting to Rs.85,000/- against the tax liability of the Appellant for the year under consideration as determined by learned AO."*

18. At the outset, the learned counsel for the assessee submitted that the assessee would be satisfied if this issue is set aside to the file of the Assessing Officer for grant of credit of fringe benefit tax paid after verification of facts from the record. The learned senior DR did not object to the same. Accordingly, the Assessing Officer is directed to verify the records regarding fringe benefit tax paid and provide credit for the same as per law.

19. In the result, appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open court on 19th September, 2019.

| | |
|---|---|
| Sd/- | Sd/- |
| **(SHAMIM YAHYA)** | **(MAHAVIR SINGH)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Mumbai, Date : 19th September, 2019

*SSL*

Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "J" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai