

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

**BEFORE SHRI M. BALAGANESH, AM
&
SHRI RAVISH SOOD, JM**

**IT(TP)A No.2076/Mum/2016
(Assessment Year :2011-12)**

M/s. DSM Nutritional Products Pvt. Ltd., 401, 4 th Floor, Windsor House Near BKC, Kalina Santacruz, Mumbai - 400 098	Vs.	Deputy Commissioner of Income Tax-9(3)(1) Mumbai
PAN/GIR No.AACCR3973J		
(Appellant)	..	(Respondent)

Assessee by	Shri Dhanesh Bafna / Ms. Chandni Shah
Revenue by	Shri M C. Omi Nigshen
Date of Hearing	10/07/2019
Date of Pronouncement	04/10/2019

आदेश / ORDER

PER M. BALAGANESH (A.M):

This appeal in ITA No.2076/Mum/2016 for A.Y.2011-12 preferred by the order against the final assessment order passed by the Assessing Officer dated 28/01/2016 u/s.143(3) r.w.s.144C(13) of the Income Tax Act, hereinafter referred to as Act, pursuant to the directions of the Id. Dispute Resolution Panel (DRP in short) u/s.144C(5) of the Act dated 03/12/2015 for the A.Y.2011-12.

2. The only effective issue to be decided in this appeal is as to whether the Id DRP was justified in confirming the action of the Id TPO in determining the Arm's Length Price (ALP) in respect of payment for E-Connectivity services availed by the assessee from its Associated Enterprises (AE) at NIL instead of Rs 52,83,464/- as determined by the assessee in the facts and circumstances of the case.

3. The brief facts as reported in the order of the Id TPO are that the assessee company is engaged in the business of providing marketing support services to its AEs in the nature of assisting the AEs in providing information about customers, provide assistance in maintaining customer relationships and provide information about markets. During the year, the assessee had imported Animal Health and Nutrition Products from its AE for distribution in Indian markets along with minor sales to AEs. The Id TPO observed that the assessee had made payment for e-connectivity charges to its AE of Rs 52,83,464/- and had reported the same as an international transaction in Form 3CEB. The assessee applied Comparable Uncontrolled Price (CUP) method on cost allocation basis as the Most Appropriate Method (MAM). The assessee submitted before the Id TPO vide submission dated 28.10.2014 that during the year, it had availed information communication and technology services from its AE. These are costs in the nature of information, communication and technology support which have been charged to the assessee on a cost to cost basis, without any mark up. Copies of invoices for the service charges were furnished before the Id TPO. The assessee also submitted a letter from the AE specifying the services availed by the assessee and confirming that expenses cross charged to the assessee for such services are on cost to cost basis without charging any mark up. The Id TPO asked the assessee to produce the basis for allocation, if invoices are back to back and to

produce the evidence for AE's cost and to provide cost-benefit analysis on 18.12.2014. The Id TPO observed that the assessee could not produce the basis for allocation of cost by its AE to it and also unable to explain the benefits derived. Accordingly, the Id TPO concluded that the services rendered are routine in nature from AE to the assessee and hence there is no need to make any payment for the same and accordingly determined the ALP of the said transaction at NIL.

4. The Id DRP observed that the assessee is engaged in the business of marketing of vitamin, vitamin products, feed supplement, nutritional products, cosmetic ingredients and other fine chemicals. The assessee submitted that DSM Nutritional Products Group is the world's leading supplier of vitamins, carotenoids and other fine chemicals to the feed, food, pharmaceutical and personal care industries. The assessee stated that it had availed information communication and technology services (e-connectivity services) from its AE and had paid charges to its AE based on the actual cost incurred by its AE without any mark up and allocated to the assessee based on cost allocation keys i.e on 'Per User' basis. The following services were availed by the assessee from its AE:-

- a) Information and Communciation Technology (Aurora)
- b) Server Maintenance
- c) Intranet Services
- d) Access to DSM from non DSM locations
- e) Pushmail on Tablets & Smartphones
- f) Applications like Domino and Quickplace

4.1. The Id DRP observed that the assessee had not elaborated that how much benefit it had derived from the nature of such applications provided to it by the AE. The Id DRP observed that neither any evidence has been

produced evidencing the receipt of services nor any evidence has been produced regarding determination of cost of such services. The assessee has merely produced a letter from AE stating that costs have been allocated without any mark up and bills filed by the assessee only show that rates have been charged on the basis of number of users. In a transfer pricing scenario, it is not only to be established that any services have been obtained but what has to be established is that such services were at arm's length vis a vis a third party uncontrolled transaction. Unless this exercise is carried out (which actually has not been carried out by the assessee), it cannot be established that the benefits if any, derived from such tools and services were at arm's length. The Id DRP observed that no comparability analysis has been carried out rather all the transactions have been bundled and the TNMM has been applied. The sum and substance of Id DRP observation is that the assessee had not provided the evidences regarding receipt of services , the benefits derived from such services or cost incurred towards such so called services. With these observations, the Id DRP upheld the action of the Id TPO.

5. Aggrieved, the assessee is in appeal before us on the following grounds :-

“Each of the grounds and/ or sub-grounds of the appeal are independent and without prejudice to the others.

1. On the facts and in the circumstances of the case and in law, the Ld. Dispute Resolution Panel ('DRP') erred in confirming the action of the Ld. Transfer Pricing Officer ('TPO') in determining the arm's length price of the Appellant's international transaction of payment for e-connectivity services availed from its associated enterprise as NIL instead of Rs. 52,83,464 as determined by the Appellant.

2. In doing so, the HonTDle DRP/ Ld. TPO has grossly erred in :

a) Ignoring that the Appellant had supported the value of e-connectivity charges paid with appropriate evidences;

- b) Challenging the commercial rationale and expediency of availing services by the Appellant;*
- c) Ignoring that the Appellant is not required to establish the benefit arising out of the said services;*
- d) Rejecting the comparability analysis carried out by the Appellant to demonstrate ALP in the Transfer Pricing study*

The Appellant therefore prays that the addition made by the Ld. AO of Rs. 52,83,464 under section 143(3) read with Section 144(0(5) of the Act on the basis of the directions provided by the DRP be deleted.

3. On the facts and in the circumstances of the case and in law, the Learned AO erred in levying interest under section 2340 of the Act amounting to Rs. 3,84,159.

The Appellant craves leave to add, omit or alter grounds of appeal before or during the hearing of aforesaid matter.”

6. We have heard the rival submissions and perused the materials available on record. We find that the assessee had made payment to DSM Business Services BV (i.e AE) in relation to Corporate Information and Communication Technology (Aurora) charges for the period 1.4.2010 to 31.3.2011 pursuant to cost allocated in the sum of Euro 87461.01 to the assessee. We find that the assessee had filed a confirmation letter dated 21.10.2014 from its AE before the Id TPO wherein the AE had specifically confirmed rendering of services to the assessee for which charges were allocated to the assessee on cost to cost basis without any mark up. The charges represent DSM Information and Communication Technology (ICT) cost incurred by DSM Business Services BV towards, inter alia, the following services availed by assessee :-

- Information & Communication Technology (Aurora):
Operation, maintenance and update of ICT on workplaces, includes communication via networks and office applications as well as conferencing system.*
- Server maintenance charges:*

Operation, maintenance and execution monitoring of data / application servers for data storage and application execution. Includes monitoring of access rights to folders on servers.

- *Intranet services:*

Secure access to DSM owned internal data from all ICT workplaces. Includes system to share structured information and data from all DSM locations and premises.

- *Access to DSM from non DSM locations:*

Data connection costs from outside DSM connection points into DSM owned network.

- *Pushmail on Tablets & Smart phones:*

*Email exchange between DSM ICT's Email System and tablet computers
And smart phones*

- *Operation costs of dedicated applications like Domino and Quick plac”e*

6.1. We find that the assessee had further elaborated in detail vide its letter dated 12.1.2015 before the Id TPO , the various services provided by the AE and the benefits derived by the assessee pursuant to rendering of such services at global level by the AE in the tabular form as under:-

<i>Service</i>	<i>Nature</i>	<i>Benefit to assessee</i>
<i>Information & Communication Technology (Aurora)</i>	<i>Operation, maintenance and update of ICT' on workplaces, includes communication via networks and office applications as well as conferencing system.</i>	<i>Installation of DSM customized operating system, installed on specific hardware manufactured by Dell only mid its updates needed by users within DNP India which makes a secured DSM Intranet-1 (called DSM AURORA). Communication within DSM employees via live meeting and conferencing. Without this DSM employee cannot work within DSM Network (this is basic services to by part of DSM). No activity like mail communication / data storage etc is possible in this intranet if it is not under AURORA environment</i>
<i>Server</i>	<i>Operation, maintenance</i>	<i>Storage of all documents</i>

<i>Maintenance</i>	<i>and execution, monitoring of data / application servers for data storage and application execution. Includes monitoring of access rights to folders on servers.</i>	<i>produced or received by employees within DNP India at safe and secure data storage locations including backups and restore facilities. Operation of applications for DNP India at application servers placed in safe and secure locations including support in case of failure and disturbances.</i>
<i>Intranet Services</i>	<i>Service access in DSM owned internal data from all-ICT workplaces. Includes system in share structured information and data from all DSM locations and premises.</i>	<i>It provides a secured platform where ONP India employees can access the information wherein no outsider has access to get the information. Important and actual information about belongings of the DSM company can be extracted to do the daily work.</i>
<i>Access to DSM from non DSM locations</i>	<i>Data connection from outside DSM connection points into DSM owned network</i>	<i>It provides facility to all the employees of DNP India particularly sales and marketing team working from outside DNP India environment to access mails and internet when they are travelling or working from home.</i>
<i>Pushmail on Tablets and Smartphones</i>	<i>E-mail system on tablet computers and smartphones</i>	<i>All email exchange, contact lists and time planning is made available at tables and / or smartphones for the employees which are on travel or outside the DNP India Premises</i>
<i>Application like Domino and Quickplace</i>	<i>Access to applications like Domino and Quickplace</i>	<i>It provides access to DNP employee to important applications like Domino and Quickplace required for business operations.</i>

6.2. We are convinced with the arguments advanced by the Id AR that the aforesaid services are extremely critical to ensure the smooth functioning of day to day business of the assessee in India. We find that the whole purpose of having a centralized IT-set up within the group was to avoid

duplication of efforts and to make the arrangement administratively convenient and cost effective. Accordingly, we hold that the said services are such that an independent enterprise in comparable uncontrolled circumstances would have been willing to pay for the activity if performed for it by an independent enterprise.

6.3. We find lot of force in the argument of the Id AR that the e-connectivity services availed by the assessee form part of the cost base of the following main activities of the assessee :-

a) **Marketing support services** – wherein as per the agreement for provision of marketing support services between the assessee and the AE, the assessee is compensated on cost plus basis (i.e agreed operating expenses plus agreed margin) for its activity of provision of marketing support services. Hence the payment of e-connectivity charges to its AE on cost allocation basis form part of the cost base and is already recovered by the assessee with a mark up from its AE.

b) **Distribution activity** - wherein as per the distribution agreement entered into by the assessee with its AE , the purchase price of the products for the assessee shall be arrived at after reducing the expected operating expenses and the arm's length operating margin from the expected net sales price of the products to the customer. It is not in dispute that the payment of e-connectivity charges to its AE on cost allocation basis form part of the cost base. The pricing policy of the distribution activity of the assessee is such where the assessee pays the AE after retaining a margin on revenue and recovering its operating costs including e-connectivity charges from the revenue earned from customers in India. There is no dispute before us that the payment of e-connectivity charges being on revenue account, its impact would be directly on the

operating margin. Therefore along with other operating costs , e-connectivity charges is also reduced from the sales to determine the amount to be paid by the assessee to its AE.

6.4. We find that the assessee had provided the basis of allocation of cost before the Id TPO vide letter dated 12.1.2015 by primarily stating that the costs incurred by AEs in providing the services to the various AEs along with third party costs are pooled together and then allocated to the different AEs on a 'Per User' basis. Therefore the allocation basis is 'Usage'. We find that the allocation key used in the instant case is 'Usage' and the assessee had placed reliance on Para 7.20 to 7.24 of OECD TP Guidelines wherein 'Direct Charge Method' and 'Indirect Charge Method' are prescribed. In the instant case, we find that the cost has been allocated by the AE to the Indian entity (i.e assessee herein) by applying Indirect Charge Method based on the Usage. The Id AR stated that each DSM group entity availing the services from the AE will give the AE the projected number of users for each service and based on that the AE will determine the per user cost. The total cost is accumulated with respect to each service and per user cost is calculated by dividing the total cost by number of budgeted users.

6.5. We find that the Id TPO agreed to the fact that the services were indeed rendered by the AE to the assessee herein, but concluded that the nature of services rendered are routine in nature. Having accepted the fact that services were rendered by AE, then there is no reason to disbelieve the payment incurred thereon on cost to cost basis without any mark up. We find that the Id TPO in his order conceded the fact of rendering of services by the AE to the assessee but stated that they were only routine in nature not warranting any payment of cost. Whereas the

Id DRP observed that no services were indeed rendered by the AE to the assessee warranting any payment of cost and additionally the Id DRP stated that the assessee had not proved the benefits derived by it from the services availed from AE. We find that the Id DR vehemently relied only on the order of the Id DRP. It is now well settled that the Id TPO cannot question the commercial expediency of the transaction carried out by the assessee as it falls within the exclusive domain of the Id AO. We have already held hereinabove that variety of services rendered by the AE to all the group entities including the assessee herein together with the related benefits derived by the assessee therein. We find that the cost allocation key used is 'Per User' basis by the AE for allocation of cost without any mark up. The invoices raised by the AE on the assessee in this regard also goes to prove that the same are on cost to cost without any mark up. All these facts are confirmed by the AE vide separate letter dated 21.10.2014 filed before the lower authorities. Moreover, we have already held that the payment of e-connectivity charges forms part of the cost base (i.e operating cost in both marketing support services and distribution activity) and the entire operating costs had been recovered with arm's length margin from the AE. Hence there is no reason to determine the ALP of the said international transaction at NIL by the Id TPO which has been wrongly upheld by the Id DRP.

6.6. We find that the Id TPO for the Asst Year 2010-11 (immediately preceding assessment year), had accepted the claim of the assessee for payment for e-connectivity charges in the sum of Rs 41,48,949/- wherein CUP method was followed by the assessee for making payment to AE on cost to cost basis without any mark up, u/s 92CA(3) of the Act dated 29.1.2014 which is placed on record before us. We find that the assessee had also placed on record a letter dated 8.1.2014 filed for the Asst Year

2010-11 before the Id TPO gave the same reply as was given for Asst Year 2011-12. When the same reply was accepted by the Id TPO in Asst Year 2010-11, there is no reason to take a divergent stand in Asst Year 2011-12 especially when there is absolutely no change in the facts and circumstances of the case. We also find that the Id TPO had also accepted the payment of e-connectivity charges to be at arm's length in the transfer pricing assessment completed u/s 92CA(3) of the Act dated 8.1.2016 for the Asst Year 2012-13, a copy of which is placed on record.

6.7. Finally we hold that the Id TPO had determined the ALP of payment for e-connectivity charges at NIL without resorting to any of the methods prescribed in the statute. We hold that once a reference is received by the Id. TPO u/s.92CA(1) of the Act from the Id. AO, the Id. TPO is required to determine the ALP of the international transaction as per the provisions contained in Section 92C and 92CA of the Act read with relevant rules thereon. From the conjoint reading of the relevant sections and the relevant rules, we find that the duty of the Id. TPO is restricted only to the determination of the arm's length price of an international transaction between two related parties by applying any of the methods prescribed u/s.92C of the Act read with rule 10B of the rules. Thus, there is no provision made in the statute empowering Id. TPO for determining the ALP on a particular international transaction at NIL without resorting to any of the methods prescribed. We find that the Hon'ble Jurisdictional High Court in the case of CIT vs. Johnson & Johnson Limited in ITA No.1030 of 2014 dated 07/03/2017 had held as under:-

"4.Regarding question (D) :

(a)The respondent assessee paid to its Associated Enterprises (AE), technical know how royalty of 2%. The Transfer Pricing Officer (TPO) by order dated 24th March, 2005 restricted the technical know how royalty paid by the respondent assessee to its AE at 1% instead of 2%, as claimed. In terms of the determination dated 24th March, 2005 of the TPO on the

above issue amongst others, an assessment order dated 28th March, 2005 for the subject Assessment Year was passed by Assessing Officer under Section 143(3) of the Act.

(b) Being aggrieved with the order dated 28th March, 2005 of the Assessing Officer, the respondent assessee preferred an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 22nd March, 2007, the appeal of the respondent assessee on the issue of royalty payable on technical know how, allowed the appeal. It inter alia held that restricting the royalty paid on account of technical know how to 1% was arbitrary and adhoc. In as much as, there were no reasons justifying the restriction of the technical know how royalty paid by the respondent assessee to its AE at 1%. Moreover, it also records the fact that the TPO did not determine the ALP of the technical know how royalty by adopting any of the methods prescribed under Section 92C of the Act.

(c) Being aggrieved, the Revenue carried the issue in appeal to the Tribunal. By the impugned order dated 20th August, 2013 the Tribunal dismissed the Revenue's appeal inter alia upholding the order of the CIT(A).

(d) We find that the impugned order of the Tribunal upholding the order of the CIT(A) in the present facts cannot be found fault with. The TPO is mandated by law to determine the ALP by following one of the methods prescribed in Section 92C of the Act read with Rule 10B of the Income Tax Rules. However, the aforesaid exercise of determining the ALP in respect of the royalty payable for technical know how has not been carried out as required under the Act. Further, as held by the CIT(A) and upheld by the impugned order of the Tribunal, the TPO has given no reasons justifying the technical know how royalty paid by the Assessing Officer to its Associated Enterprise being restricted to 1% instead of 2%, as claimed by the respondent assessee. This determination of ALP of technical know how royalty by the TPO was adhoc and arbitrary as held by the CIT(A) and the Tribunal.

(e) In the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained.”

6.7.1. Respectfully following the aforesaid decision of Hon'ble Jurisdictional High Court, the action of the Id TPO in determining the ALP of payment for e-connectivity charges at NIL without resorting to any of the methods prescribed under the statute deserves to be dismissed.

6.8. In view of the aforesaid observations, we have no hesitation in directing the Id TPO/ Id AO to accept the claim of payment for e-connectivity charges in the sum of Rs 52,83,464/- to be at Arm's Length. Accordingly, the grounds raised by the assessee are allowed.

7. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 04/10/2019

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 04/10/2019
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai