

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : I-1 : NEW DELHI
BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

ITA No.3059/Del/2015
Assessment Year: 2008-09

Cargill Global Trading India Pvt. Ltd., 111, Rectangle-I, Saket District Centre, Saket, New Delhi.	Vs	DCIT, Circle-5(2), New Delhi.
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PAN: AACCC0446P

(Appellant)

(Respondent)

Assessee by	:	Shri Nageshwar Rao, Advocate
Revenue by	:	Shri Sanjay I Bara, CIT, DR
Date of Hearing	:	01.10.2019
Date of Pronouncement	:	.11.2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 25th February, 2015 of the CIT(A)-44, New Delhi, relating to assessment year 2008-09

2. The grounds raised by the assessee are as under:-

“Based on the facts and circumstances of the case, the Appellant respectfully submits:

1. That on facts and in law, the Learned CIT (A) has erred in confirming that the Learned TPO has discharged his statutory onus by establishing that the conditions specified in clause (a) to (d) of Section 92C (3) of the Act have been satisfied before disregarding the arm’s length price determined by the Appellant and proceeding to determine the arm’s length price himself.

2. The Learned CIT (A) has grossly erred in contending that no proper evidence was submitted by the Appellant to prove that certain intra group services were actually availed by the Appellant, undermining the reasonableness of the evidence submitted by the Appellant.

3. The Learned CIT (A) by upholding the addition made by the Ld. Assessing Officer/Transfer Pricing Officer, has grossly erred in questioning the need for availing certain intra group services from its associated enterprises ('AEs'). The Learned CIT (A) has exceeded his jurisdictional reach by challenging the commercial expediency and business decisions of the Appellant and by expecting the Appellant to demonstrate any tangible/quantitative benefit from the receipt of such services.

4. The Learned CIT(A) has failed to take cognizance of the fact that certain intra group services availed by it from its associated enterprises have benefitted the Appellant in the smooth and efficient functioning of its various businesses in India and erroneously concluded that only incidental benefits were received by the Appellant from availing such services.

5. The Learned CIT(A) has grossly erred by concluding that certain intra group services received by the Appellant from its AE were 'duplicate' in nature.

6. The Learned CIT(A) has grossly erred by not giving due cognizance to the fact that the Appellant could not have availed certain intra group services from unrelated parties which were a case of business necessity and requirement for the Appellant and the associated enterprises have not provided such services in the capacity of holding company/ group company.

7. The Learned CIT (A) has failed to give due consideration to the fact that in prior years, when facts of these impugned transactions remained same as in AY 2008-09, the said transactions were considered by the Learned AO/TPO to be at arm's length in those years.

8. Without prejudice to the above grounds, the Learned CIT (A) has failed to prove that the Arm's Length Price of certain intra group services availed would depend on the benefit derived by Appellant.

9 Without prejudice to the above grounds, the Learned CIT(A) has grossly erred by assuming the arm's length price of certain intra group services to be 'Nil' and '30 percent of value o transaction' (in case of administrative services and 'administrative and technical training services') while applying the Comparable Uncontrolled Price (CUP) method to benchmark the impugned transactions.

The Learned CIT(A) has not made any efforts to identify comparable uncontrolled transactions, in absence of which, the CUP method cannot be applied.

The above grounds are independent and without prejudice to each other.

The Appellant craves leave to add, alter, supplement, amend, vary, withdraw or otherwise modify the ground mentioned herein above at or before the time of hearing.”

3. Facts of the case, in brief, are that the assessee is a company engaged in the business of trading of various agricultural commodities such as corn, soya bean, maize, edible oil, fertilizers, etc. It filed its return of income on 31st March, 2010 declaring an income of Rs.52,08,74,989/-. Since the assessee has entered into certain international transactions with its AE, the Assessing Officer referred the matter to the file of the TPO for determination of the ALP of the international transaction entered into by the assessee. The TPO, during the TP assessment proceedings noted that the assessee in its transfer pricing study report has classified the international transactions into two categories, namely, a) merchant trade; and (b) other transactions. He observed that the assessee has benchmarked the international transactions relating to ‘merchant trade’ using TNMM as the most appropriate method. The ‘other transactions’ has been benchmarked using TNMM/CUP the details of which are as under:-

Type of the transaction	Method selected	Total Value (Rs.)
Merchating trade (Purchase)	TNMM using Operating Profit as PLI Value added cost	27,986,417,370
Merchating trade (Sales)		28,078,622,161
Discounting charges	CUP	420,257,359
Provision of business / forwarding support services	TNMM using Operating Profit as PLI Operating cost	15,181,220
Provision of support services		13,594,170
Provision of sub-advisory services		31,276,283

Availing of treasury services		559,020
Availing of administrative services		2,719,190
Cost recharge		16,817,000

4. He, therefore, issued a questionnaire to the assessee in respect of the payments made for certain intra group services. It was stated by the assessee that it has received various services such as human resources, business unit engineering, accounting and audit services, credit management and public affairs, tax services, regional network group, availing corporate IT and other services, administrative and technical support services, etc. The assessee also submitted the agreement for services and cost sharing dated 01.06.2004 and 01.06.2005 and the service agreement dated 06.01.2006. The assessee also filed documentation from Cargill stating the features and value of the IT related services for business which includes write ups on shared storage, back up, internet connection services, Cargill remote accesses services, Cargill mobile office, instant messaging, mobility solutions, mailbox restoration etc.

5. However, the TPO noted that most of the evidences filed by the assessee are irrelevant since it consists of invoices and simply filing invoices is not evidence of services rendered. So far as filing of administrative services for which an amount of Rs.27,19,190/- has been paid, he observed that the assessee has not filed any evidence as to how it has benefited from the receipt of this service which are numerous in number. The assessee should have been able to file some evidence in connection with advice on law or taxation or human resources or even help

received by the AE for audits, etc. However, nothing has been filed in this respect. He, therefore, held that no payment is warranted in this respect for which he reduced the ALP to nil. So far as availing of corporate, IT and other services for which an amount of Rs.3,91,170/- is paid is concerned, he observed that the assessee filed some details for the services and the assessee also uses the software and other programmes prepared by the assessee. However, he noted that some of these pertained to the period 2008-09 and 2009-10 making most of it irrelevant. According to the TPO, the evidences so filed by the assessee is not enough to prove that the services have actually been used or received by the assessee. So far as availing of treasury services for which an amount of Rs.5,59,020/- has been paid, he noted that no documentation regarding the help claimed to have been received from the AE was furnished. The TPO, therefore, held that the ALP of this transaction be reduced to '0'. So far as administrative and technical training is concerned, the submission of the assessee that it received help for various administrative functions in terms of training and guidance, advice and trade documentation and other kinds of management support was rejected by the TPO on the ground that the assessee has not filed a single piece of evidence which would show that it is connected with receiving any such support. He, therefore, held that the assessee failed to discharge its onus and, therefore, the payment on this account should be reduced to nil. Relying on various decisions, OECD Guidelines, etc., the TPO held that for the purpose of determining the arm's length price, it becomes necessary to examine whether the services were really availed by the assessee or

not. He opined that the ‘benefit test’ is a highly relevant factor and no person would pay for services unless he receives direct and tangible benefit from it. Finally, the TPO, applying the CUP method, determined the ALP of the transaction of payment of service fee at nil as against Rs.1,97,43,210/- determined by the assessee by observing as under:-

“Universally, such payments are being treated at arm’s length only when it is proved substantially by the taxpayer that such services were actually received and further proving that such received services have benefited it. In most of the countries like UK, USA, Germany etc it is an established position that a subsidiary does not have to pay for the auditing, accounting and such other functions performed by the parent company as owner of the subsidiary company. If the subsidiary were an independent company it would neither require such services nor would it pay for the same.

14. No independent party would have made such large payments in uncontrolled circumstances. Therefore, by the application of CUP, the arm’s length of this transaction of payment of service fee is determined at NIL as against Rs. 19,743,210 determined by the assessee. The assessing officer shall enhance the income of the assessee by Rs.19,743,210/-.”

6. Before the CIT(A), the assessee filed certain additional evidences which were admitted by the CIT(A) and, thereafter, forwarded to the A.O./TPO for a remand report. After considering the remand report of the TPO and relying on various decisions, the Id.CIT(A) deleted the adjustment made in connection with the treasury services. However, the arm’s length price of the administrative services and cost reimbursement was determined by him at 30% of value by observing as under:

“8.7.1 As regard administrative services (Rs. 2,719,190), the TPO has observed that the appellant has not filed any evidence as to how it has benefitted from the receipt of these services which are numerous in number and it should have been able to file some evidence in connection with advise

on law or taxation or human resources or even help received from the AE for audits etc. The TPO has determined the ALP of administrative services at NIL. As regards Administrative support services from Cargill Asia Pacific Holdings Pte. Ltd (CAPHPL), the appellant has stated that during AY 2008-09, CGTIPL availed administrative services such as accounting and audit services, management services, human resources (HR) and legal services, information and system services, etc. In consideration of the services availed, CGTIPL pays a service fee equivalent to allocated costs plus a mark-up of 6 percent. I have carefully considered the submission of the appellant. I have also perused the additional evidence submitted by the appellant. The appellant has submitted that AE provides consolidated, timely information such as P&L reporting, budgets, sales volume, SGA information, Balance sheet and capital expenditure along with accounting assistance and co-ordinate accounting policies. These services were rendered through E mails, presentations, online access, phone conferences, meetings and workshops. This assistance results in minimization of financial and regulatory risk and improvement of key financial ratios due to an increase in operational efficiency and profitability. As regards Administrative and Technical training services (Rs. 16,425,830), the TPO has observed that the appellant has not filed single piece of evidence in support of its contention that it receives help for various administrative functions, in terms of training and guidance, that it received advice on trade documentation and other kinds of management support. I have carefully considered the submission of the appellant. I have also perused the additional evidence submitted by the appellant. Cargill TSF Asia Pte Limited has provided the administrative and technical training service to appellant. The appellant has submitted that AE provides various support services such as training and guidance on various administrative functions, provision of information on potential trade transactions and counterparties, advice on trade documentation, and other management support. These services were rendered through Workshops, Conferences, Emails, Research Material. The appellant has claimed that the appellant company is able to carry out its business operations more efficiently in an increasingly globalized and competitive scenario. I have considered the observation of the TPO in the remand report and the reply of the appellant to the remand report. I have also gone through the paper book submitted by the appellant during the course of the appellate proceedings. The appellant has engaged local professionals for Administrative Services / Administrative & Technical training services and incurred huge expenses on these accounts. These services are partly in the nature of duplication of services incidental services/share-holders' services. On perusal of the additional evidence, it is observed that there is no proper evidence to prove that these services were actually rendered. The appellant could demonstrate only in a few instances that the services were actually received in this case. Considering the facts of the case, I hold that 70% of administrative services (Rs.2,719,190) and Administrative & Technical training services (Rs. 16,425,830) are in the nature of duplication of services/incidental services/share-holders' services and not supported by proper evidence.

Accordingly, the ALP of Administrative Services (Rs. 2,719,190) and Administrative & Technical training services (Rs. 16,425,830) is computed at Rs.57,43,506/-, being 30% of Rs 1,91,45,020/-[27,19,190 + 1,64,25,830).”

7. The ld. counsel for the assessee strongly challenged the order of the CIT(A) in computing the ALP of the administrative services and administrative and technical training services at Rs.57,43,506/- being 30% of the value. He submitted that both the TPO as well as the CIT(A) have applied the CUP as the most appropriate method without citing any reasons, without indicating any basis for selection of the most appropriate method, without reference to any uncontrolled transaction and by emphasizing at irrelevant aspects like the services received in question being duplicative in nature, tangible benefit accruing to the assessee not being established and there was no need for procuring such services. The ALP of the administrative services and cost reimbursed has been arbitrarily fixed at 30% of the value and 70% of the same has been directed to be adjusted is not justified. He submitted that during the appellate proceedings, all the facts, documents necessary for evaluating benchmarking of services availed, cost reimbursed, etc., were submitted. Relying on various decisions, he submitted that when all necessary facts and findings of the lower authorities are available on record remand is unwarranted and opposed to law. A second innings cannot be allowed to the authorities to improve their case. For the above proposition, he relied on the decision of the Tribunal in a Third Member case in *ACIT vs. Kumar Ice*, 237 ITR 1, the decision of the Hon'ble Gujarat High Court in the case of *Rajesh Babhubhai*

Damania, (2001) 254 ITR 541, the decisions of the Hon'ble Supreme Court in the case of *Purushottam Reddy vs. Pratap Steels* (2002) 2 SCC 686 and in the case of *Mohinder Singh Gill vs. Chief Election Commissioner* reported in AIR 1978 SC 851. Referring to the decision of the Hon'ble Delhi High Court in the case of *CIT vs. EKL Appliances Ltd.*, reported in (2012) 345 ITR 241 (Del), he submitted that the Hon'ble Delhi High Court in the said decision has held that there is no need to establish necessity and benefit especially in proceedings before the TPO. Similarly, a conclusion has been reached in the case of *Cushman Wakefield*, 46 *taxmann.com* 317. He submitted that the adjustment made by the TPO to ALP for consideration paid for availing services and upheld by the CIT(A) on the pretext of applying CUP are not valid in law as neither most appropriate method of CUP is chosen with reference to criteria indicated under the Act and Rules nor is the ALP determined by reference to any uncontrolled transaction. He accordingly submitted that the order of the CIT(A) sustaining the addition should be deleted and the search process and ALP determination applied by the assessee in its transfer pricing study deserves to be upheld.

8. The ld. DR, on the other hand, strongly opposed the arguments advanced by the assessee. He submitted that what the ld. counsel for the assessee is saying amounts to treating the TP study undertaken by the assessee as sacrosanct. Referring to para 10.3 of the order of the TPO at page 9, he drew the attention of the Bench to the findings given by the TPO according to which the assessee has

not filed any documentary evidence to support that it has actually received services and, in fact, benefitted from the services. He submitted that since the Id. CIT(A), after considering the factual matrix of the case has held that 30% of the administrative services and cost reimbursement is at ALP, therefore, no further relief should be granted to the assessee and the grounds raised by the assessee should be dismissed.

9. We have considered the rival arguments made by both the sides and perused the orders of the A.O./TPO/CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions. We find the Assessing Officer, on the basis of the report of the TPO, has made an upward adjustment of Rs.1,97,43,210/- being the arm's length price of the international transaction with the AE by applying CUP method wherein the TPO had applied the CUP method as the most appropriate method. We find, in appeal, the Id.CIT(A) deleted an amount of Rs.5,59,020/- being the treasury services availed by the assessee. So far as the administrative services of Rs.27,19,190/- administrative and technical services of Rs.1,64,25,830/- are concerned, he held that these are in the nature of duplication of services/incidental services/shareholders' services and not supported by proper evidence and he accordingly determined the ALP of the administrative services and administrative and technical training services at Rs.57,43,506/- being 30% of Rs.1,94,45,020/- as the ALP. It is the submission of the Id. counsel for the assessee that the method adopted by the TPO/A.O./CIT(A) is without any basis,

without reference to any uncontrolled transaction and by emphasizing on irrelevant aspects like the services received in question being duplicative in nature or tangible benefit accruing to the assessee has not been established and there was no need for procuring such services.

10. It is an admitted fact that the assessee has filed certain details before the TPO as well as before the CIT(A) and, after obtaining the remand report from the A.O./TPO, the Id.CIT(A) has deleted the TP adjustment in respect of treasury services amounting to Rs.5,59,020/- and held the ALP of the administrative services and administrative and technical training services at 30% of the value. The Revenue is not in appeal for the same. This otherwise implies that the Revenue is admitting that certain services have been received by the assessee from its AE. We find from the order of the TPO/Assessing Officer that the only reason cited for determining the ALP of such services at nil was that the assessee did not need the services as the same were duplicative and that the assessee did not derive any tangible benefit from such expenditure. We find the Hon'ble Delhi High Court in the case of *CIT vs. EKL Appliances Ltd. (supra)* has decided somewhat identical issue and held that so long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. The relevant observation of the Hon'ble Delhi High Court from placitum 20 onwards read as under:-

“20. In the case of [Sassoon J. David & Co. Pvt. Ltd. v. CIT](#), (1979) 118 ITR 261 (SC), the Supreme Court referred to the legislative history and noted that when the Income Tax Bill of 1961 was introduced, [Section 37\(1\)](#) required that the expenditure should have been incurred "wholly, necessarily and exclusively" for the purposes of business in order to merit deduction. Pursuant to public protest, the word "necessarily" was omitted from the section.

21. The position emerging from the above decisions is that it is not necessary for the assessee to show that any legitimate expenditure incurred by him was also incurred out of necessity. It is also not necessary for the assessee to show that any expenditure incurred by him for the purpose of business carried on by him has actually resulted in profit or income either in the same year or in any of the subsequent years. The only condition is that the expenditure should have been incurred "wholly and exclusively" for the purpose of business and nothing more. It is this principle that inter alia finds expression in the OECD guidelines, in the paragraphs which we have quoted above.

22. Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in the view of the Revenue the expenditure was unremunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. These are irrelevant considerations for the purpose of Rule 10B. Whether or not to enter into the transaction is for the assessee to decide. The quantum of expenditure can no doubt be examined by the TPO as per law but in judging the allowability thereof as business expenditure, he has no authority to disallow the entire expenditure or a part thereof on the ground that the assessee has suffered continuous losses. The financial health of assessee can never be a criterion to judge allowability of an expense; there is certainly no authority for that. What the TPO has done in the present case is to hold that the assessee ought not to have entered into the agreement to pay royalty/ brand fee, because it has been suffering losses continuously. So long as the expenditure or payment has been demonstrated to have been incurred or laid out for the purposes of business, it is no concern of the TPO to disallow the same on any extraneous reasoning. As provided in the OECD guidelines, he is expected to examine the international transaction as he actually finds the same and then make suitable adjustment but a wholesale disallowance of the expenditure, particularly on the grounds which have been given by the TPO is not contemplated or authorised.

23. Apart from the legal position stated above, even on merits the disallowance of the entire brand fee/ royalty payment was not warranted. The assessee has furnished copious material and valid reasons as to why it was suffering losses continuously and these have been referred to by us earlier. Full justification supported by facts and figures have been given to demonstrate that the increase in the employees cost, finance charges,

administrative expenses, depreciation cost and capacity increase have contributed to the continuous losses. The comparative position over a period of 5 years from 1998 to 2003 with relevant figures have been given before the CIT (Appeals) and they are referred to in a tabular form in his order in paragraph 5.5.1. In fact there are four tabular statements furnished by the assessee before the CIT (Appeals) in support of the reasons for the continuous losses. There is no material brought by the revenue either before the CIT (Appeals) or before the Tribunal or even before us to show that these are incorrect figures or that even on merits the reasons for the losses are not genuine.

24. We are, therefore, unable to hold that the Tribunal committed any error in confirming the order of the CIT (Appeals) for both the years deleting the disallowance of the brand fee/ royalty payment while determining the ALP. Accordingly, the substantial questions of law are answered in the affirmative and in favour of the assessee and against the Revenue. The appeals are accordingly dismissed with no order as to costs.”

11. Since, in the instant case, the incurring of the expenditure is not in dispute and since the only reason given by the Revenue authorities is that the assessee did not need the services as the same were duplicative and that the assessee did not derive any tangible benefit from such expenditure and did not file sufficient details to establish that it has, in fact, received some benefit or that the AE has rendered some services, therefore, respectfully following the decision of the Hon'ble Delhi High Court cited (supra), we set aside the order of the CIT(A) and direct the A.O./TPO to delete the addition. The grounds raised by the assessee are accordingly allowed.

12. In the result, the appeal filed assessee is allowed.

The decision was pronounced in the open court on 15.11.2019.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER
Dated: 15th November, 2019

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

dk

Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi