IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI PRAMOD KUMAR, VICE PRESIDENT, AND

SHRI SAKTIJIT DEY, JUDICIAL MEMBER

IT(TP)A no.1472/Mum./2016
(Assessment Year : 2011–12)

U.T. Worldwide India Pvt. Ltd.
7th Floor, Unit no.1171
Solitaire Corporate Park
Building no.1, Andheri Kurla Road
Andheri (E), Mumbai 400 093
PAN – AAACU5306L

……. Appellant

v/s

Asstt. Commissioner of Income Tax
Circle–11(1)(2), Mumbai

……. Respondent

Assessee by : Ms. Karishma Phatarphekar a/w Shri Harsh Shah
Revenue by : Shri Purushottam Tripuri

Date of Hearing – 05.11.2019	Date of Order – 26.11.2019

O R D E R

PER SAKTIJIT DEY, J.M.

The captioned appeal by the assessee is against the final assessment order dated 28th January 2016, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (for short *"the Act"*) for the assessment year 2011–12, in pursuance to the directions of the Dispute Resolution Panel–2 (DRP), Mumbai.

2. In ground no.1, the assessee has challenged the validity of the assessment order passed without implementing the directions of the DRP.

3. Similar issue has also been raised by the assessee in ground no.4. Therefore, we propose to deal with the aforesaid issue at a later stage.

4. In grounds no.2, 3 and 5, the assessee has challenged the transfer pricing adjustment made towards reimbursement of expenditure paid / payable to the assessee.

5. The assessee, an Indian company, is a part of U.T. Worldwide Group U.K. As stated by the Transfer Pricing Officer, this group is a world leader in international flight forwarding business. Whereas, the assessee is engaged in the business of logistics relating to freight forwarding by air and ocean, custom clearance and contract logistics, etc. Further, it has been stated that the assessee has also entered into an agreement with U.T.T. Networks Inc., U.K. for forwarding by air or sea of general commodities. On a perusal of audit report in Form no.3CEB, the Transfer Pricing Officer found that the assessee has benchmarked the payment made and received towards freight forwarding concerning the Associated Enterprises (AEs) in various countries applying Comparable Uncontrolled Price (CUP) method.

However, the assessee had not benchmarked the transaction relating to reimbursement of expenses (paid or payable). When called upon to explain the reason for not doing so, the assessee submitted that the UT group has incurred certain expenses for the benefit of the assessee which was later reimbursed on actual basis. Thus, it was submitted by the assessee that reimbursement of expenses by the assessee to other group companies is at arm's length based on application of CUP. To justify its claim, the assessee also furnished the details of item wise reimbursement of expenses to the AEs which has been reproduced at Page–3 of the order passed by the Transfer Pricing Officer. After considering the submissions of the assessee and the details furnished, the Transfer Pricing Officer observed that the assessee was unable to establish that it has received any benefit due to the cost incurred by the AEs. Accordingly, he concluded that since the assessee has failed to establish the benefit derived relating to the cost incurred by the AEs on various account, the arm's length price of such transaction has to be determined as nil. Thus, he proposed a adjustment of ₹ 11,11,20,158. The assessee challenged the aforesaid adjustment in due course before learned DRP.

6. After considering the submissions of the assessee in the context of facts and material on record, learned DRP having found that the payment made towards freight liability, UT general liability and others,

verizon communication charge / infonet communication cost, stock compensation cost, RSU cost are at arm's length accepted such payments. Thus, the DRP allowed reimbursement of expenses to the extent of ₹ 1,73,42,606. However, reimbursement of administrative expenses towards U.T. Global Infrastructure support (ENT LED cost), FF global support (ENT cost) and APAC Regional cost aggregating to ₹ 9,37,77,552, where not allowed by learned DRP. The reasoning of learned DRP while upholding the decision of the Transfer Pricing Officer in this regard is, the allocation of expenses is not based on any service utilized and their commensurate cost. Learned DRP observed, as per the business model followed by the UT group, the exporting group entities earned 67% of the fees received from the customers, while importing group entities earn 33% of the fees. Learned DRP observed, the amount being shared on 67:33 basis is with reference to the profit earned from gross receipt. Thus, when there is a revenue sharing at gross receipt level and such revenue sharing is having regard to the functions the respective group entities would undertake, there is hardly any justification for further reimbursement of cost towards administrative expenses/management fee, etc.

7. The learned Authorised Representative submitted, the Transfer Pricing Officer has to determine the arm's length price of the international transaction by adopting one of the prescribed method

under the statute. She submitted, the Transfer Pricing Officer is not justified in determining the arm's length price at nil applying commercial expediency and benefit test without following any one of the prescribed methods. She submitted, while considering identical issue in assessee's own case for the assessment year 2009–10, the Tribunal has deleted the adjustment made in respect of reimbursement of expenses by then Transfer Pricing Officer and the DRP adopting similar approach. Thus, she submitted, the issue is covered by the decision of the Tribunal. Further, she submitted, in assessment year 2010–11, the Transfer Pricing Officer himself has accepted similar payments made to be at arm's length. Thus, she submitted, the reimbursement of expenses to the AEs being at arm's length has to be allowed.

8. The learned Departmental Representative strongly relying upon the reasoning of learned DRP submitted, when the assessee and the group entities are sharing revenue on fixed ratio basis, there is no justification for further reimbursement of cost incurred towards administrative expenses, management fee, etc. He submitted, the reason on which the DRP has upheld the adjustment was not there in the assessment year 2009–10. Thus, he submitted, the decision of the Tribunal in assessment year 2009–10 may not be applicable.

9. We have considered rival submissions and perused the material on record. It is seen from the factual matrix that the assessee has entered into various agreements with the group entities for provision of certain service. By virtue of such agreements, the assessee has the benefit of using the overall UT Network outside India. Similarly, the group companies are also bound to use assessee's services for their operations in India. As per the terms of the agreement, if some freight was required to be transported by the customer from overseas to India then such transaction was to be referred to as an import transaction and if it was to be transported by a customer from India to overseas, then the same was to be referred to as an export transaction. Fee earned from a customer is reduced by cost of transportation and the balance amount is shared by exporting and importing entities in the following manner.

Originating Place	*U.T. India*	*U.T.I. Group Entity*
India	*67%*	*33%*
Oversees	*33%*	*67%*

10. The aforesaid business and revenue sharing model has been followed by the assessee and group entities from the past years. It is observed, similar reimbursement of expenses was made to the group entities in the past years under similar revenue sharing model of 67:33. Therefore, the contention of the learned Departmental

Representative that the facts involved in this year is different from assessment year 2009–10 due to 67:33 revenue sharing model, in our view, is without basis and not borne out from the record. Rather, the facts on record very clearly indicate that the revenue sharing model of 67:33 and vice versa has been followed by the assessee as well as group entities from past years including assessment year 2009–10. On a perusal of the order passed in assessee's own case in assessment year 2009–10 as referred to above, it is observed that the Tribunal while deciding the issue relating to identical adjustment made by determining the arm's length price of reimbursement of expenditure at nil has reversed the decision of the Revenue authorities and held that the determination of arm's length price of the transaction at nil cannot be supported. Further, the Tribunal also did not accept the reasoning of the Departmental Authorities that the assessee had failed to satisfy the benefit test. On the contrary, the Tribunal has observed that whether the assessee benefited by availing the services of the AEs is not an issue to be examined by the Transfer Pricing Officer. Accordingly, the Tribunal deleted the adjustment. It is also relevant to observe, while doing so, the Tribunal also took note of the fact that in assessment year 2010–11, the Transfer Pricing Officer himself has accepted the reimbursement of the administrative expenses / management fee paid to the AEs to be at arm's length. Thus, considering the past event and the revenue sharing model consistently followed by the

assessee as well as the decision of the Tribunal in assessee's own case for the assessment year 2009–10, as referred to above, we are of the considered opinion that the adjustment of ₹ 37,77,552, deserves to be deleted. Accordingly, we do so.

11. In grounds no.1 and 4, the assessee has challenged the validity of the assessment order passed due to non–implementation of the directions of the DRP.

12. As discussed earlier, while deciding the issue relating to the adjustment made to the arm's length price of reimbursement of expenses under various heads, the Transfer Pricing Officer has determined the arm's length price at nil and suggested adjustment of ₹ 11,11,20,158. While deciding the objections of the assessee on the issue, learned DRP allowed reimbursement of certain expenses such as freight liability, UT general liability and others, verizon communication charge / infonet communication cost, stock compensation cost, RSU cost, aggregating to a total amount of ₹ 1,73,42,606. While framing the final assessment order, the Assessing Officer again added back the entire adjustment of ₹ 11,11,20,158, suggested by the Transfer Pricing Officer, thereby, failing to implement the directions of learned DRP in respect of reimbursement of expenses described above.

13. The leaned Counsel for the assessee submitted, as per section 144C(13) of the Act, it is mandatory on the part of the Assessing Officer to implement the directions of the DRP. She submitted, since the Assessing Officer has failed to implement the directions of the DRP, the assessment order is void ab initio, hence, has to be quashed. For such proposition, she relied upon the decision of the Tribunal, Bangalore Bench, in DCIT v/s Coriant Communication India Pvt. Ltd., IT(TP)A no.652/Bang./2016, dated 2nd June 2017. Without prejudice, she submitted, a direction to the Assessing Officer may be issued to implement the directions of the DRP in terms of section 144C(13) of the Act.

14. The learned Departmental Representative submitted, necessary direction may be issue to the Assessing Officer to implement the directions of learned DRP.

15. We have considered rival submissions and perused the material on record. At the outset, we must observe, though, initially learned Authorised Representative relying upon the decision of the Tribunal in Coriant Communication India Pvt. Ltd. (supra), had argued at some length for quashing the assessment order due to non–implementation of the directions of the DRP, however, finally, she has submitted that a direction from the Bench to the Assessing Officer to implement the directions of learned DRP would suffice. Undisputedly, while

considering assessee's objection against the transfer pricing adjustment made of ₹ 11,11,20,158, relating to reimbursement of expenses to the AEs, learned DRP has granted partial relief to the assessee by holding certain reimbursement expenses aggregating to ₹ 1,73,42,606, to be at arm's length. However, while implementing the directions of learned DRP in final assessment order, the Assessing Officer has completely ignored the specific directions of learned DRP in respect of the following expenditures which were accepted to be at arm's length.

Freight Liability, UIT General Liability & Ors.	*₹ 70,97,155*
Infonet Communication Cost	*₹ 95,982*
RSU Cost	*₹ 26,56,407*
Verizon Communication Charges	*₹ 68,58,094*
Total:–	*₹ 1,73,42,606*

16. As per section 144C(13) of the Act, the Assessing Officer is duty bound to implement the directions of the DRP as he has to pass the final assessment order in conformity with such directions. Admittedly, there is a lapse on the part of the Assessing Officer in complying to the provisions of section 144C(13) of the Act. To that extent, the addition made by the Assessing Officer ignoring the directions of learned DRP cannot be upheld. Therefore, we direct the Assessing Officer to implement the directions of learned DRP in letter and spirit in respect

of reimbursement of expenditures mentioned above. The grounds raised by the assessee are allowed to the extent indicated above.

17. In ground no.6, the assessee has challenged disallowance of expenditure of ₹ 13,74,073.

18. Brief facts are, in the course of assessment proceedings, the Assessing Officer called upon the assessee to furnish party wise details of misc. expenditure debited to the Profit & Loss Account along with name and address of the parties, nature and purpose of expenditure incurred and details of TDS on such payment. As alleged by the Assessing Officer, in response to the query raised, the assessee failed to furnish the necessary details. Accordingly, the Assessing Officer proceeded to disallow the expenditure of ₹ 13,74,073. While deciding assessee's objection on the issue, learned DRP also upheld the disallowance.

19. The learned Authorised Representative submitted, the Assessing Officer had asked to submit the details before the Assessing Officer at a very short notice. Nevertheless, she submitted, the assessee furnished certain details before the Assessing Officer as well as the DRP. She submitted, without properly examining the details furnished, the DRP has sustained disallowance of expenditure. She submitted, neither the Assessing Officer nor the DRP sought any specific

information from the assessee. She submitted, the Revenue authorities have also neither doubted the genuineness of expenditure nor have held that they were not incurred wholly or exclusively for the purpose of business. Finally, she submitted, the Departmental Authorities have disallowed expenditure without providing adequate opportunity to the assessee.

20. The learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned DRP.

21. We have considered rival submissions and perused the material on record. It is evident, both, the Assessing Officer and learned DRP have made the disallowance primarily on the reasoning that the assessee failed to furnish any supporting evidence relating to the expenditure claimed. It is the say of the assessee that neither the Assessing Officer nor learned DRP have asked for specific details in course of proceedings before them, however, some details of the expenditures were furnished which have not been considered. In our view, assessee deserves an opportunity to prove the allowability of expenditure through supporting evidence. Accordingly, we restore this issue to the Assessing Officer for fresh adjudication after providing due opportunity of being heard to the assessee.

22. In ground no.7, the assessee has challenged disallowance of provisions of ₹ 21,71,540.

23. Brief facts are, during the assessment proceedings, the Assessing Officer called upon the assessee to furnish party wise details of expenditure debited to the Profit & Loss Account along with details of tax deducted at source on such payment. After perusing the details furnished by the assessee, he found that the assessee has not deducted tax in respect of legal and professional charges amounting to ₹ 4,21,456, repairs and maintenance expenses of ₹ 15,25,084, and other expenses of ₹ 2,25,000, aggregating to ₹ 21,71,540. When called upon to explain why tax was not deducted at source on year end provision for expenditure, the assessee submitted that the provision is generally made on the past estimate and experience in respect of expenditure which have accrued during the year but invoices are not received. The Assessing Officer observed, though, the assessee has claimed that provision was made on estimate basis, however, relevant evidence to support such estimation was not furnished. Even, the assessee failed to furnish necessary evidence to support such estimation. Further, the assessee failed to furnish proof of deduction of tax at source. Accordingly, he proceeded to disallow the amount of ₹ 21,71,540. The aforesaid disallowance made by the Assessing Officer was also upheld by learned DRP.

24. The learned Authorised Representative submitted, the assessee follows mercantile system of accounting, hence, is required to account for all the expenses accrued during the year. Therefore, it is required to make provision of expenses accrued during the year at the end of the year on estimation basis. She submitted, since while making the provision the parties to whom payment is going to be made are not identifiable, it is not possible to deduct tax at source. She submitted, the provision created is written back in the subsequent year and tax is deducted at source when the actual amount of expenditure is credited. Thus, she submitted, the disallowance should be deleted.

25. The learned Departmental Representative strongly relying upon the observations of the Assessing Officer and learned DRP submitted, the expenditure claimed by the assessee are in the nature of provision and has not crystallized during the year. Therefore, it cannot be allowed as expenditure.

26. We have considered rival submissions and perused the material on record. From the details available on record, it is noted that the amount of ₹ 21,71,540, debited to the Profit & Loss Account represents provision made for expenditure relating to legal and professional charges, repairs and maintenance and others. It is also evident, the assessee has not received any invoices relating to such expenses

before the end of the financial year. Though, the assessee has submitted that the provision has been made on estimation basis relying upon the past experience, however, no supporting evidence has been furnished to prove that the estimation made by the assessee is near to actual figure or the expenditure matching the provisions made has actual crystallized during the year. It is also a fact that the assessee has not deducted tax at source on such expenditure on the plea that the parties to whom such payments were to be made are not identifiable. If the parties to whom payments are to be made are not identifiable due to non–raising of invoices, we fail to understand how it can be said that the expenditure has crystallized in the year under consideration. Therefore, we are of the view that the provision made of ₹ 21,71,540, debited to the Profit & Loss Account is in the nature of unascertained liability, hence, cannot be allowed in the year under consideration. However, it has been submitted by the assessee that it has written back the provision in the next year and has also deducted tax at source when the actual amount of expenditure was debited in the subsequent year. This fact needs to be examined by the Assessing Officer and consequential relief can be granted to the assessee in the subsequent year, wherein, the provision has been written back after proper verification of record. This ground is dismissed.

27. In ground no.8, the assessee has challenged the disallowance of bonus of ₹ 3,33,542, under section 43B of the Act.

28. Brief facts are, while verifying the audited report in the course of assessment proceedings, the Assessing Officer noticed that service tax of ₹ 3,583 and bonus of ₹ 7,70,060, have not been paid on/or before the due date of filing of return of income. Whereas, in the computation of income, the assessee has disallowed only an amount of ₹ 4,94,482, in respect of bonus. Alleging that the assessee neither furnished any explanation nor reconciliation towards non–disallowance of balance outstanding dues of ₹ 3,29,937, he disallowed it by invoking the provisions of section 43B of the Act. While deciding the objection on the issue, the DRP directed the Assessing Officer to verify assessee's claim that there is no outstanding bonus due and service tax payable and decide it accordingly.

29. The learned Authorised Representative submitted, the assessee has made appropriate disallowance in the computation of income. She submitted, due to a arithmetic mistake in the tax audit report, the Assessing Officer has made the disallowance. She submitted, though, detailed submission was made before the Assessing Officer explaining the error committed in the tax audit report, however, the Assessing Officer still repeated the disallowance on the ground that no certificate from the auditor was submitted. She submitted, necessary direction

may be issued to the Assessing Officer to decide the issue on the basis of facts and material on record and in accordance with law.

30. The learned Departmental Representative submitted, no such mathematical error has been brought to the notice of Assessing Officer.

31. We have considered rival submissions and perused the material on record. As could be seen, in the draft assessment order the Assessing Officer made disallowance under section 43B of the Act in respect of outstanding dues of bonus and service tax. Before learned DRP, the assessee specifically pleaded that there is no outstanding bonus remaining to be disallowed under section 43B of the Act. It was submitted by the assessee that out of the bonus amounting to ₹ 79,71,705, an amount of ₹ 74,77,223, has already been paid by the assessee and the balance outstanding bonus amounting to ₹ 4,94,482, not paid till the due date of filing of return of income has already been disallowed by the assessee. In our view, the aforesaid claim of the assessee should be verified by the Assessing Officer on the basis of supporting evidence filed by the assessee without insisting upon any certificate from the auditor. If the evidences filed by the assessee demonstrate that there is no outstanding bonus remaining to the disallowed under section 43B of the Act, no such disallowance should be made. This ground is allowed for statistical purposes.

32. In ground no.9, the assessee has raised the issue of short grant of TDS by the Assessing Officer.

33. Having considered rival submissions, we direct the Assessing Officer to allow credit of TDS as per Form no.26AS and in accordance with law.

34. In ground no.10, the assessee has challenged initiation of penalty proceedings.

35. This ground being pre–mature at this stage, no adjudication is required. Accordingly, this ground is dismissed.

36. In the result, appeal is partly allowed.

Order pronounced in the open Court on 26.11.2019

Sd/-	**Sd/-**
PRAMOD KUMAR	**SAKTIJIT DEY**
VICE PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 26.11.2019

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai