

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

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 343/MUM/2017
Assessment Year: 2012-13**

Brinks India Pvt. Ltd.
(Formerly known as 'Brinks
Arya (India) Private Ltd. '),
Pankaj Building, 1st Floor, Unit
102, Plot No. 1, Behind
Chandivali Ice Factory, CTS
46/1, Off Chandivali Farm
Road, Chandivali, Mumbai-
400072.

PAN No. AAACB3302R

Appellant

Vs. Dy. Commissioner of Income Tax
Circle 6(4), Room No. 1925, 19th
floor, AIR India Building, Nariman
Point, Mumbai-400021.

Respondent

Assessee by : Mr. Farrokh V. Irani, AR

Revenue by : Mr. Suhas Kulkarni, DR

Date of Hearing : 28/11/2019

Date of pronouncement : 27/12/2019

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2012-13. The appeal is directed against the order passed by the Deputy Commissioner of Income Tax, Central Circle-6(4), Mumbai (in short 'AO') u/s 143(3) r.w.s. 144C(13) of the Income Tax Act 1961, (the 'Act').

2. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2012-13 on 08.11.2012 declaring total income of Rs.28,91,46,998/-. A reference u/s 92CA(1) was made by the AO to the Transfer Pricing Officer (TPO) for determination of Arm's Length Price (ALP) with reference to all the transactions referred in Form 3CEB filed by the assessee.

The assessee is a part of Brink's Global Services (BGS) which provides global risk management and secure logistics for valuables including diamonds, jewellery, precious metals, securities, currency, high-tech devices etc. The services provided by BGS covers the services related to pick-up and delivery of valuable and time sensitive shipments such as bank notes, securities, diamonds, jewellery, precious metals, computer chips, traveler's cheques, and credit cards. Brink's air courier services is all inclusive from pick-up to delivery, including transportation, security, insurance, storage, documentation and, if applicable, customs clearance.

During the year under consideration, the assessee has paid management fees to its Associated Enterprises (AEs) as under :

Sr. No.	Name of the AE	Amount (in Rs.)
1.	Brink's Incorporated USA	3,53,07,309
2.	Brink's Asia Pacific Ltd. Hong Kong	53,18,313/-

The assessee has paid management fees to its AEs for the first time. In response to a query raised by the TPO to explain it, the assessee filed a reply stating that the services are availed under an agreement entered into with its

AEs dated 01.01.2011 for management and technical services. As per the said agreement, the AEs will be providing the following services to the assessee :

- Accounting Services
- Management and Operations Services
- Financial and Treasury Services
- Legal Services
- Human Resources Services
- Research and Development
- Information Systems Services and Related Equipment
- Other Services

The assessee submitted before the TPO that the management services received yield benefits as under :

- It improves the efficiency
- It reduces the cost
- Deduction has not been claimed by the AE's in its Return
- The AE can provide these services better as it has pool of talent in terms of personnel and technology.
- The Cost allocation is as per the annual study. It doesn't maintain timesheet, allocation of time for various category of services.
- Services provided are bifurcated into regional services and global services.
- The allocation key is based on turnover where the total global and regional cost has been allocated.

However, the TPO was not convinced with the above explanation of the assessee and observed that the assessee has not benchmarked the transaction separately and relied on global report and agreement and therefore, the same is not acceptable, as under the TP provisions, each international transaction is

to be benchmarked separately. Thus the TPO held that as management fees constitute a separate class of transaction, it should be benchmarked separately. The TPO held that in the case of the assessee the payment for service is to be benchmarked by Comparable Uncontrolled Price (CUP). Further, the TPO noted that the assessee has filed for availing of the services only one Brink's Global & Regional Services Report 2011.

The TPO held that while the assessee has given description of the various services for which payment is stated to have been made, actual evidence for receipt of service has not been furnished to justify the cost allocation or to enable the ALP determination. Therefore, the TPO estimated that, at the very best, the AE could have devoted a maximum of the following man hours in respect of various services claimed to have been availed by the assessee

Name of the AE	Total (in INR)	
Brink's Incorporated USA	3,53,07,309	750 hrs for all services considering all submissions
Brink's Asia Pacific Ltd. Hong Kong	53,18,313	
Total	4,06,25,622	750 hrs

Observing that the assessee has failed to file the details regarding the number of employees working with the AE, salaries paid to those employees, their educational qualification, number of hours dedicated by those employees towards services rendered to the assessee, the TPO estimated to his best judgment to quantify the value of the services, if at all any, being rendered by the AE to the assessee. Having regard to the nature of services which are claimed to have been rendered in the present case, the TPO

estimated the salary for such an employee at Rs.3,000/- per hour. Further, he estimated the number of man hours rendered by the employees towards rendering of these services to the assessee at 750 hours. Applying the man hour rate of Rs.3000/- per hour, he arrived at the arm's length compensation of the services rendered by the AO to the assessee at Rs.22,50,000/- by applying CUP method. Accordingly, he made an adjustment of Rs.3,83,75,622/- (Rs.4,06,25,622/- minus Rs.22,50,000/-) to the international transaction on account of corporate cost allocation charges paid.

2.1 The TPO passed an order u/s 92CA(3) of the Act and made an adjustment of Rs.3,83,75,622/-. Thereafter, the AO incorporated the TPO's order and issued a draft order dated 16.03.2016 u/s 143(3) r.w.s. 144C(1). The assessee filed objections; Form 35A in respect of variations made by the AO in the draft order passed dated 16.03.2016 before the Dispute Resolution Panel (DRP). The DRP held that the TPO has rightly determined the ALP of the intra group services at Rs.22.50 lakhs. The AO, then following the direction of the DRP, made an addition of Rs.3,83,75,622/- on account of transfer pricing.

3. Before us, the Ld. counsel for the assessee submits that the assessee has consistently been benchmarking all of its transactions with the AE under Transactional Net Margin Method (TNMM) from the beginning, for now over seven years and in all three previous assessment years i.e. from AY 2009-10 to 2011-12, wherein its international transactions with AEs were in scrutiny, the assessments have been completed by accepting the transactions with AE being at arm's length, holding TNMM as the most appropriate. It is stated that in respect of management fees paid/payable during the year under consideration, the assessee has *inter alia* submitted its working, calculation,

allocation, method, rational and business expediency before the TPO. In respect of management fees paid/payable by the assessee, it has furnished the report titled "Brinks Global & Regional Services 2011", which provides *inter alia* the department/category-wise details, working and supporting in various appendices. It also included the details of services provided by the AE and break up of cost of different services. The Ld. counsel argues that the assessee had also submitted that in case the TPO requires any further detail, information or clarification, it would be glad to submit the same on knowing about the requirement.

The Ld. counsel states that the TPO has wrongly made adjustment to the ALP of management fees by holding that the CUP method as the most appropriate method, without doing any benchmarking or comparison with comparable uncontrolled transactions and doing an ad-hoc unilateral pricing of management fees, disregarding the facts and circumstances of the case and thus erred in rejecting the ALP determined by the assessee without appreciating that it is not permitted under the law.

Finally, the Ld. counsel explains that the AO wrongly made an adjustment to the ALP of management fees by holding that CUP method is the most appropriate method and doing an ad-hoc unilateral estimation of Rs.22,50,000/- by assuming arbitrarily 750 hours @ Rs.3000/- per hour without providing the basis of this estimates and without considering the documents submitted in respect of actual costs and alleging that the same had not been provided, disregarding the facts and circumstances of the case and erred in rejecting the ALP determined by the assessee.

During the course of hearing the Ld. counsel relies on the order of the Tribunal in the case of *Kellogg India Pvt. Ltd. v. DCIT* (ITA No. 2866/Mum/2014) for AY 2009-10; *M/s CLSA India Pvt. Ltd. v. DCIT* (ITA No. 1182/Mum/2017) for AY 2012-13; *Firmenich Aromatics India P. Ltd. v. DCIT* (ITA No. 2590/Mum/2017) for AY 2012-13.

4. On the other hand, the Ld. Departmental Representative (DR) submits that as observed by the DRP the assessee has not benchmarked the international transactions at all, which is clearly a violation of law. It has not shown how the various transactions are closely linked and how they cannot be evaluated adequately on a separate basis. It is further stated that the assessee has failed to show that specific and distinct services were rendered by the AE, for which payment to the extent made by it needs to be paid. Further, it is stated that nothing has been placed either before the TPO or the DRP to demonstrate any benefit received by the assessee from the services rendered for which payment is claimed. Elaborating further, the Ld. DR submits that the assessee has not submitted any details and evidence of costs actually incurred by the AE, specifically for providing the services to the assessee; it has also not been able to give separate details of costs paid for each service stated to have been availed; all that is stated is that costs incurred by AE have been reimbursed on allocation basis, however, no details of such costs incurred by AE and actual evidence thereof were furnished.

On the basis of the above arguments, the Ld. DR supports the order passed by the AO.

5. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the instant case, the assessee has consistently been benchmarking all of its transactions with the AE under TNMM from the beginning, for now over seven years. In all three previous assessment years i.e. from AY 2009-10 to 2011-12, wherein its international transactions with AEs were in the scrutiny, the assessments have been completed by accepting the transactions with AE being at arm's length holding TNMM as the most appropriate method. The assessee had submitted before the TPO that its operating revenue is Rs.168.88 crores and the operating profit is Rs.21.78 crores; the profit level indicator i.e. OP/OR works out to 12.90% for the year under consideration. The assessee submitted working of it before the TPO. Also it submitted the arithmetic mean of the profit level indicator of the comparables which worked out to 4.86% for the year under consideration. We find that in respect of management fees paid/payable during the year under consideration, the assessee had submitted before the TPO its working, calculation, allocation, method, rational and business expediency.

In such a situation, the TPO should not have summarily rejected the TNMM in respect of management fees paid/payable by the assessee to its AE and proposed an adjustment of Rs.3,83,75,622/- under the CUP method, without benchmarking with comparable uncontrolled transactions. In the instant case, the TPO has resorted to an ad-hoc unilateral pricing of management fees, disregarding the facts and circumstances of the case.

In the case of *Kellogg India Pvt. Ltd.* (supra), the Tribunal has rightly held that :

“Even assuming that the benchmarking done by the assessee was not correct, the Transfer Pricing Officer should have benchmarked the royalty payment by applying

any of the prescribed methods. However, without applying any prescribed method he has simply determined the arm's length price of royalty payment at Nil. The aforesaid approach of the Transfer Pricing Officer is not in accordance with statutory provisions, hence, unsustainable."

Similar view has been taken by the Tribunal in *M/s CLSA India Pvt. Ltd.* (supra) and *Firmenich Aromatics India P. Ltd.* (supra).

5.1 To sum up, in the instant case, the TPO has summarily rejected the TNMM followed by the assessee in respect of management fees paid/payable by it to its AE and proposing an adjustment under CUP without benchmarking with comparable uncontrolled transactions. Also the TPO has resorted to an ad-hoc unilateral pricing of management fees, disregarding the facts of the case.

In view of the above factual scenario and position of law, we delete the addition of Rs.3,83,75,622/- made by the AO as adjustment on account of transfer pricing.

6. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 27/12/2019.

Sd/-

Sd/-

(SAKTIJIT DEY)
JUDICIAL MEMBER

(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 27/12/2019

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai