IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I-2', NEW DELHI

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No.7555/Del/2019
Assessment Year: 2014-15

M/s. Nymphea Developers Pvt. Ltd., C-3/260, Janakpuri, New Delhi	**Vs.**	ACIT, Circle-19(1), New Delhi
PAN :AABCO5609H		
(Appellant)		**(Respondent)**

Appellant by	Ms. Rashmi Chopra, Adv. Shri Ruchesh Sinha, Adv.
Respondent by	Shri Sukesh Kumar Jain, CIT(DR)

Date of hearing	28.01.2020
Date of pronouncement	03.02.2020

ORDER

PER O.P. KANT, AM:

This appeal was fixed for hearing on the direction of the Hon'ble Delhi High Court, dated 24/12/2019. In the present appeal of the assessee, the application (SA No. 982/Del/2019) for stay of recovery of demand filed by the assessee was rejected by the Tribunal vide order dated 8/11/2019. The request for early hearing of the appeal was also turned down by the Tribunal. On further appeal by the assessee, Hon'ble Delhi High Court in order dated 24/12/2019 passed in ITA 1017/2019 directed the

Tribunal to hear the appeal on 28/01/2020 with following observations:

> *"7. Having heard the learned counsels, the following question of law are framed:-*
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> *A. Whether on the facts and circumstances of the case and under law, the Income Tax Appellate tribunal (ITAT) has erred in law is rejecting the application for the stay of demand as well as the request for early hearing of the case made by the Appellant?*
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> *B. Whether the Income Tax Appellate Tribunal (ITAT) erred in holding that the Appellant could not prove her case for grant of early hearing?*
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> *8. In the light of the aforesaid submissions, the question of law framed above are answered in favour of the appellant. We, therefore, dispose of this appeal by directing the Tribunal to hear the appeal of the appellant, pending before it."*

2. This appeal has been preferred by the assessee against order dated 30/08/2019 passed by the CIT(Appeals)-44, New Delhi [in short the 'Ld. CIT(A)'] for assessment year 2014-15 raising following grounds:

1. *The order of the CIT(A)-44, Delhi is assailed of being a perverse order, as the same passed without considering the submissions of the assessee, without taking a holistic view of the case, without giving any justifiable reason for confirming the order of the AO/TPO and is sub silentio order passed in any arbitrary manner.*
2. *The CIT(A)-44, Delhi has erred in law in facts in confirming the order of the AO/TPO wherein the AO/TPO has made an addition of Rs.68,80,48,216/- in the case of the assessee.*

3. Briefly stated facts of the case are that the assessee company was engaged in business of real estate activities in development of project under collaboration. For the year under consideration, the assessee filed return of income on 06/02/2015

declaring total income of Rs.1,19,64,540/-. The case was selected for scrutiny assessment and notice under section 143(2) of the Income-tax Act, 1961 (in short 'the Act') was issued and complied with. During the scrutiny proceedings, the Assessing Officer noted specified domestic transaction and, therefore, he referred the benchmarking of the transaction to the learned TPO. The facts in respect of the specified domestic transaction reproduced by the Ld. CIT(A) in the impugned order is extracted as under :

> *"6.1 The salient facts of the case are as follows. The appellant is a private limited company engaged in the business of real estate, it is a consortium of three different company of the Orris Group including Orris Infrastructure Private Limited (OIPL). During the year under reference, the appellant had made a specified domestic transaction with its Associated Enterprise namely OIPL. The appellant applied to Yamuna Expressway Industrial Development Authority for allotment of land for development and was granted a plot Bearing Number TS-02, Sector 22D Yamuna Expressway. District Gautam Buddha Nagar, UP of about 200 acres for the purpose of making an integrated township. Different areas in the said plot was marked tor residential, commercial, institutional and for road - parking.*
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> *6.2 The AE (OIPL) was also engaged in real estate business of developing and selling of residential, commercial units sector. The appellant and OIPL entered into a Collaboration Agreement dated 01/03/2012 under which the appellant gave up its rights to OIPL to develop the real estate project at its own cost in consideration of agreed share in the built-up area of the project land as defined in detail in the said agreement. Hence, the rights and interest of the project land were transferred from the appellant to OIPL.*
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> *6.3 ATS Realty Private Limited was a private limited company with its registered office at Nehru place, New Delhi which was also engaged in the real estate operations. ATS is an unrelated party. Subsequently a deed of lease was executed between Yamuna Expressway Development Authority, ATS and the appellant. In lieu of the development rights of the 100 acres of project land transferred to OIPL, a sum of Rs. 68,80,48.216 was paid to OIPL directly by ATS on behalf of the appellant for relinquishing its rights over hundred acres of land which was then sold by the appellant to OIPL. The transaction between the appellant OIPL and ATS was recorded in writing in a Memorandum of Understanding (MoU) dated 13/05/2012 and a sub lease deed between ATS. Yamuna*

Expressway Development Authority and appellant was also registered and 100 acres of land was sold to ATS."

3.1 The assessee submitted a transfer pricing report prepared by the Chartered Accountant, wherein computations relating to the profitability of the assessee, NPV calculations are provided. The assessee claimed that in view of the 'other method' as most appropriate method, the payment made by the assessee to its Associated Enterprise (AEs) was not excessive. The learned TPO after analysing the agreement and other information found that the value of the transaction was recorded at different values at a different places. The values observed by the learned TPO is reproduced as under:

S. No.	**Nature of Transaction**	**Amount as per From 3CEB**	**Amounting as per financial with Associates**	**Amount as per financial**
1.	Collaboration Expenses	688,048,216	897,554,825	35,569,403

3.2 The TPO rejected the benchmarking made by the assessee to be colourable device. The learned TPO, in view of absence of reliable data valued the specified domestic transaction of collaboration expenses at nil. The relevant finding of the learned TPO is reproduced as under:

"7.3 In view of the discussions at paras 6 and 7.2 above, it is concluded that the economic substance of the transaction differs from its form and the transaction is so arranged that when viewed in totality, it differs from those which would have been adopted by independent enterprises behaving in a commercially rational manner. This principle is laid down in the OECD guidelines in paragraphs 1.36 to 1.41.

7.4 Assessee also raised the contention that there was no loss to the revenue by undertaking this transaction. Here it needs to be emphasized that the main focus of this transfer pricing audit is correct computation of ALP of specified domestic

transaction. While computing ALP, it is not necessary to find whether there was any motive to shift expenses or income to the related party. It has been held in Coca Cola Pvt. Ltd. 309 1TR 194 (P&H) that there is no need to show motive of shifting of profit to invoke transfer pricing provisions.

7.5 For benchmarking the above stated transaction, the other method applied by the assessee as MAM was examined and found that the report of the Chartered Accountant submitted to justify the payment based on NPV calculations was based on premise and not verifiable data. The Chartered Accountant has also given a disclaimer in this regard because the opinion was based on unverifiable data. Therefore, the benchmarking adopted by the assessee is rejected.

7.6 Considering the fact that the economic substance of the stated specified domestic transaction differs from its form and no independent third party would have adopted such an arrangement, it seems that the assessee has used a 'colourable device' to avoid taxes rather than tax planning. In the absence of reliable data the arm's length price of this specified domestic transaction is taken as NIL.

8. Accordingly, the total adjustment of 1NR 608,048,216 is required to the made to the income of the assessee by the Assessing Officer. The assessee was afforded reasonable opportunity of being heard."

3.3 The Assessing Officer in assessment order dated 30/12/2017 made addition for the transfer pricing adjustment proposed by the learned TPO. Aggrieved, the assessee filed appeal before the Ld. CIT(A) and filed detailed submissions. The objection of the assessee in respect of the colourable device have been rejected by the Ld. CIT(A) observing as under:

"6.8 Ground No. 2 pertains to the contention of the appellant that the AO had erred in confirming the order of the TPO who had made an addition of Rs.68,80,48,216 on account ot payment made by the appellant to its associate enterprise. The TPO has disallowed the payment of Rs.68,80,48,216 as in a transaction between two unrelated parties, the appellant would not have made payment OIPL for sale of land to ATS. Hence, the AO/TPO has correctly held to be a colourable device.

6.9 The contention of the appellant is not accepted as the Issue relates to transaction between related parties which is a specified domestic transaction. The .Act gives the power to the 4 PG to examine the arm's-length price of such transactions. The contention of the appellant is not accepted as two independent parties in an uncontrolled situation would not have entered into such an agreement. The concerned of the Government behind introducing Transfer Pricing Regulation to specified domestic transactions is to ensure that transactions between related parties follow the market principle so that the income and profit of an entity is calculated correctly."

3.4 The objection of the assessee that the learned TPO has not found any flaw in the working of the assessee reported in transfer pricing report , were also dismissed by the Ld. CIT(A) observing as under:

"6.11 Ground No. 3 pertains to the contention of the appellant that the AO had erred in not considering that the TPO had not found any flaw in the working reflected in the transfer pricing report which was prepared by a Chartered Accountant. The AO has considered the different agreements and the contentions of the appellant which have been discussed and commented upon in the body of the order itself. The main issue pointed out by the AO/TPO is that in an unrelated party scenario where market conditions prevail, the appellant would not have made a payment of Rs.68,80,48,216 to OIPL. The contention of the appellant is not accepted as the issue relates to transaction between related parties and the TPO has the jurisdiction, as per law, to determine the value of the transaction or the income / profit derived from the same at market value."

3.5 Aggrieved with the finding of the Ld. CIT(A), the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

4. Before us, the learned Counsel of the assessee submitted that the learned TPO himself as noted that he did not dispute whether the transaction took place not, but according to him the question was whether such transactions should have taken place or not. In view of the learned counsel of the assessee the learned TPO/AO should not sit in the armchair of the businessmen and

decide whether such transactions should have taken place or not. According to him, the learned TPO was required to benchmark the specified domestic transaction and if he was not satisfied with the working of the assessee, he should have made his valuation of the transaction in accordance with various methods provided under law. The Ld. counsel relied on the decision of the Hon'ble Delhi High Court in the case of M/s Cushman and Wakefield (India) P Ltd in ITA 475/2012 to support the contention that matter is referred to the learned TPO only for the limited purpose of determining the ALP and he did not have authority to decide whether the transaction should happen or not. Accordingly, requested that matter maybe restored back to Ld. AO/TPO for deciding the arm's-length price of the specified domestic transaction in accordance with law.

5. The learned Departmental Representative on the other hand relied on the order of the Ld. AO/TPO and submitted that entire transaction was only colourable device and therefore learned TPO is justified in benchmarking at nil.

6. We have heard the rival submission of the parties and perused the relevant metal on record. We find that the specified domestic transaction of collaboration expenses has been benchmarked by the assessee following the other method as most appropriate method. The assessee has valued the transaction at which the third-party has made payment for the transaction. We find that the learned TPO instead of benchmarking the transaction in accordance with the law, he simply taken the value of the specified transaction at nil observing that reliable data was not available. In our opinion, the learned TPO is not justified in

rejecting the benchmarking of the assessee in this manner. If data is not available then there are two options before him. First option is to gather the data available in public domain. If data is not available in public domain, he should collect from private domain by way of issue notice under section 133(6) of the Act and confront the same to the assessee and then decide the arm's-length price of the specified domestic transaction. The second option is that if no data is available, then accept the benchmarking carried out by the assessee. The TPO has no authority to hold that this transaction should not have taken place. The Hon'ble Delhi High Court in the case of Cushman and Wakefield (India) P. Ltd. (supra) has observed on the issue of authority of the TPO while benchmarking international transaction as under:

> *"35. The TPO's Report is, subsequent to the Finance Act, 2007, binding on the AO. Thus, it becomes all the more important to clarify the extent of the TPO's authority in this case, which is to determining the ALP for international transactions referred to him or her by the AO, rather than determining whether such services exist or benefits have accrued. That exercise - of factual verification is retained by the AO under Section 37 in this case. Indeed, this is not to say that the TPO cannot - after a consideration of the facts - state that the ALP is ITA 475/2012 Page 27 'nil' given that an independent entity in a comparable transaction would not pay any amount. However, this is different from the TPO stating that the assessee did not benefit from these services, which amounts to disallowing expenditure. That decision is outside the authority of the TPO. This aspect was made clear by the ITAT in Delloite Consulting India Pvt. Ltd. v. Deputy Commissioner of Income Tax, [2012] 137 ITD 21 (Mum):*
>
> > *"37. On the issue as to whether the Transfer Pricing Officer is empowered to determine the arm's length price at "nil", we find that the Bangalore Bench of the Tribunal in Gemplus India P. Ltd. 2010-TII-55-ITAT-BANG-TP, held that the assessee has to establish before the Transfer Pricing Officer that the payments made were commensurate to the volume and quality service and that such costs are comparable. When*

> *commensurate benefit against the payment of services is not derived, then the Transfer Pricing Officer is justified in making an adjustment under the arm's length price.*
>
> *38. In the case on hand, the Transfer Pricing Officer has determined the arm's length price at "nil" keeping in view the factual position as to whether in a comparable case, similar payments would have been made or not in terms of the agreements. This is a case where the assessee has not determined the arm's length price. The burden is initially on the assessee to determine the arm's length price. Thus, the argument of the assessee that the Transfer Pricing Officer has exceeded his jurisdiction by disallowing certain expenditure, is against the facts. The Transfer Pricing Officer has not disallowed any expenditure. Only the arm's length price was determined. It was the Assessing Officer who computed the income by adopting the arm's length price decided by the Transfer Pricing Officer at "nil"."*
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> *This is a slender yet crucial distinction that restricts the authority of the TPO. Whilst the report of the TPO in this case ultimately noted that the ALP was 'nil', since a comparable entity would pay 'nil' amount for these services, this Court noted that remarks concerning, and the final decision relating to, benefit arising from these services are properly reserved for the AO."*

6.1 In para of the 40 of the judgment, the Hon'ble High Court has highlighted the authority of the Assessing Officer under section 37 of the Act and authority of the learned TPO under Chapter X of the Act. The relevant para is extracted as under:

> *"40. On the first ground, this Court notes that the jurisdiction of the AO, under Section 37, and the TPO, under Section 92CA, are distinct. A referral by the AO to the TPO is only for the limited purpose of determining the ALP, based on a prima facie view that such a referral is necessary. It does not imply a concrete view as to the existence of services, or the accrual of benefit (such that allowance under Section 37 must be permitted). This very argument was considered and rejected by the ITAT in Delloite (supra):*
>
> > *"34. The second argument of learned counsel that the Transfer Pricing Officer is not empowered to disallow the expenditure and that the very reference to the Transfer Pricing Officer by the Assessing Officer presumes that the amount in question is*

> *allowable under section 37 of the Act ITA 475/2012 Page 32 and certain case laws were relied upon for this proposition.*
> *35. We are unable to persuade ourselves to agree to this proposition for the reasons that the Central Board of Direct Taxes, by way of a circular, has directed the Assessing Officer to refer to all transactions beyond a specified limit, to the Transfer Pricing Officer for determining the arm's length price. When the Assessing Officer has no discretion in the matter, in view of the binding nature of the Central Board of Direct Taxes instructions dated 20th May 2003, directing all the officers of the Department to refer the matters to the Transfer Pricing Officer for determination of the arm's length price where the aggregate value of international transactions exceeds Rs. 5,00,00,000, the Assessing Officer has a very limited role. He has to mechanically follow these instructions. There is no application of mind. There is no formation of any opinion at the stage of reference. Thus, to presume that he has allowed a particular expenditure under section 37, does not seem to be the right view of the matter. In any event, this is not a case where the Transfer Pricing Officer or the Assessing Officer made a disallowance under section 37 of the Act. It is a case where an adjustment has been made under section 92C(4) of the Act, after the Transfer Pricing Officer determined the arm's length price at nil under section 92CA(3). Hence this argument is devoid of merit."*

Indeed, a Division Bench of this Court, in Sony India Pvt. Ltd. v. Central Board of Direct Taxes and Anr., [2007] 288 ITR 52 (Delhi) (albeit considering the law prior to the 2007 amendment to the Act), concurred with this view:

> *"18 ... a reading of Section 92C and 92CA does not indicate that the AO is required to form a prior considered opinion after considering all the available materials even ITA 475/2012 Page 33 before making a reference to the TPO. A prima facie opinion would suffice at the stage of making the reference.*
> *35 ... It correctly interprets the law as requiring only a formation of a prima facie opinion by the AO at the stage of the reference. Therefore, the question of the CBDT supplanting the judicial discretion of the AO does not arise. It is perfectly possible that, independent of the circular, the AO might still "consider it necessary or expedient" to refer an international transaction of such value to the TPO for determination of the ALP. At the same time it is not as if the transactions of the value of less than Rs. 5 crores cannot be referred to the TPO by the AO. Ultimately, any exercise of discretion by the AO is bound to be judicially reviewed by the statutory appellate*

> *authorities as well as by courts. Therefore, it is not as if there is no check on the exercise of discretion by the AO."*
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> *The AO can, therefore, determine under Section 37 that the expenditure claimed (in this case, the referral fees) was not for the benefit of the business, and thus, disallow that amount. This does not restrict or in any way bypass the functions of the TPO. Quite to the contrary, it represents the correct division of jurisdiction between the two entities."*

6.3 As the TPO has not carried out exercise of determining the arm's-length price of the specified domestic transaction in accordance with law, in the interest of justice, we feel it appropriate to restore this issue back to the file of the Ld. AO/TPO for deciding afresh is directed above. It is needless to mention that the assessee shall be afforded adequate opportunity of being heard. The grounds of the appeal of the assessee are accordingly allowed for statistical purposes.

7. In the result, the appeal of the assessee is allowed for statistical purposes.

Order is pronounced in the open court on 3rd February, 2020.

Sd/-	***Sd/-***
(SUDHANSHU SRIVASTAVA)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 3rd February, 2020.
RK/-(D.T.D.)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi